

United States
Circuit Court of Appeals
For the Ninth Circuit.

JAMES F. FINDLAY, T. CLIVE DAVIES and W.

H. BAIRD,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of
the Territory of Hawaii.

Filed

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Notice of Filing Record on Writ of Error and
Designation of Plaintiffs in Error of Parts of
Record to be Printed.]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

JAMES F. FINDLAY, T. CLIVE DAVIES and W.
H. BAIRD,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

NOTICE OF FILING RECORD ON WRIT OF
ERROR AND APPELLANTS' DESIGNA-
TION OF PARTS OF RECORD TO BE
PRINTED.

To the United States of America, Defendant in
Error Herein, and to Its Attorney, JEFF Mc-
CARN, United States District Attorney for the
District and Territory of Hawaii:

Please take notice that the transcript of record on
the Writ of Error herein was filed in the above-en-
titled court on the 4th day of November, 1914, and
that the plaintiffs in error intend to rely on all of the
assignments of error and exceptions in said record,
and consider all of said record necessary for the con-
sideration thereof with the exception of the following
pages of said record, which plaintiffs in error do not
consider necessary to be printed in said record and
desire to have omitted from said record as printed:

1. Omit pp. 1a to 15, inclusive, of said record,

which pages contain orders extending the time to file said record, and insert in place thereof:

“By various orders the time of plaintiffs in error to file the transcript of record on appeal was extended to November 5th, 1914.”

2. Omit pp. 24 to 30, inclusive, being minutes of hearing.

3. Omit pp. 68 to 70, inclusive, being orders of continuance.

4. Omit pp. 71 to 72, inclusive, being minutes of hearing on motions in arrest of judgment.

5. Omit p. 78, being minutes on motion for a rehearing.

6. Omit p. 84, being minutes on allowance of bill of exceptions.

7. Omit pp. 110 to 152, inclusive, being United States Exhibits 2 to 22, inclusive, in that said exhibits elsewhere appear in full in said record.

8. Omit pp. 153 to 188, inclusive, being opinion of the Court upon the case, in that said opinion appears in full elsewhere in said record.

9. Omit also the extended title of court and cause in all cases except on the first page and in the complaint, and insert in place thereof the words “Title of Court and Cause.”

Dated: San Francisco, November 4th, 1914.

HENRY HOLMES,

W. L. STANLEY,

C. H. OLSON,

Attorneys for Plaintiffs in Error.

E. B. McCLANAHAN,

S. H. DERBY,

Of Counsel.

Admission of Service.

Due service of the within and foregoing Notice of Filing Record on Writ of Error and Appellants' Designation of Parts of Record to be Printed, and receipt of a copy thereof, this 13th day of November, 1914, is hereby admitted.

JEFF McCARN,
United States District Attorney for the District and
Territory of Hawaii.

[Endorsed]: No. 2511. United States Circuit Court of Appeals, Ninth Circuit. James F. Findlay et al., Plaintiffs, vs. U. S. of America, Defendant. Notice of Filing Record on Writ of Error and Appellants' Designation of Parts of Record to be Printed. Filed Nov. 24, 1914. F. D. Monckton, Clerk.

Names and Addresses of Attorneys.

For Appellants: HOLMES, STANLEY & OLSON,
#846 Kaahumanu Street, Honolulu, Hawaii.

For Appellee: ROBERT W. BRECKONS, United
States Attorney, Honolulu, Hawaii. [1*]

By various orders the time of plaintiffs in error to file the transcript of record on appeal was extended to November 5th, 1914.

*Page number appearing at foot of page of original certified Record.

United States of America,
District of Hawaii,—ss.

*United States District Court for the Territory of
Hawaii.*

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

JAMES F. FINDLAY, T. CLIVE DAVIES and
W. H. BAIRD,
Defendants.

Complaint.

Comes now the United States of America, plaintiff, and for cause of action against James F. Findlay, T. Clive Davies and W. H. Baird, alleges as follows, to wit:

1. That heretofore and on, to wit, the 22d day of April, A. D. 1911, at Honolulu, in the Territory of Hawaii, the said James F. Findlay, T. Clive Davies and W. H. Baird, by their certain writing obligatory, commonly called an obligation, sealed with the seals of the said James F. Findlay, T. Clive Davies and W. H. Baird, acknowledged themselves to be held and firmly bound unto the United States of America in the penal sum of Fifteen Thousand Dollars (\$15,000.00), to be paid unto the said the United States of America, the said writing obligatory being subject to a certain condition thereunder written, as follows: [16]

The condition of the within and foregoing obligation is such that if the said principal J. F. Findlay shall pay to the United States of America through the Collector of Customs at the port of Honolulu in the Territory of Hawaii the amount which the Department of Commerce and Labor of the United States shall, upon such presentation of facts, determine that the said principal is liable for on account of such penalties so alleged to have been incurred, then this obligation shall be null and void, otherwise of full force and effect.

as in and by said writing obligatory and condition thereof, a copy of which is attached hereto and marked "A," will more fully appear.

2. That thereafter and on, to wit, the 4th day of December, A. D. 1911, the Department of Commerce and Labor of the United States, through the Secretary thereof, did determine that the said James F. Findlay was liable to the United States of America for and on account of certain penalties alleged to have been incurred by him as master of the British steamship "Orteric," on account of the alleged violation of a law of the United States of America designated as the Passenger Act of 1882, as amended; and did, on said 4th day of December, A. D. 1911, determine that said liability on account of said violation did amount to the sum of Seven Thousand Nine Hundred and Sixty Dollars (\$7,960.00).

3. That thereafter and on, to wit, the 20th day of December, A. D. 1911, notice of the determination of the Department of Commerce and Labor so made

as aforesaid was given to James F. Findlay, T. Clive Davies and W. H. Baird, the defendants in this case, and demand was made upon them for the payment to the United States of America of the said sum of Seven Thousand Nine Hundred and Sixty Dollars. [17]

4. That the said defendants, James F. Findlay, T. Clive Davies and W. H. Baird, notwithstanding said demand, have not, nor has either of them, paid to the United States of America the said sum of Seven Thousand Nine Hundred and Sixty Dollars (\$7,960.00), and that there is now due from said defendants, James F. Findlay, T. Clive Davies and W. H. Baird, and each of them, to the United States of America, by reason of the premises, the said sum of Seven Thousand Nine Hundred and Sixty Dollars (\$7,960.00), together with legal interest thereon from the 4th day of December, A. D. 1911.

WHEREFORE, the United States of America prays for process against the said defendants, James F. Findlay, T. Clive Davies and W. H. Baird, and that it may have judgment against the said James F. Findlay, T. Clive Davies and W. H. Baird, for the said sum of Seven Thousand Nine Hundred and Sixty Dollars (\$7,960.00), with interest thereon from the said 4th day of December, A. D. 1911, and the costs of this action.

THE UNITED STATES OF AMERICA.

By (Sgd.) ROBT. W. BRECKONS,

United States Attorney. [18]

United States of America,
Territory of Hawaii,—ss.

Robert W. Breckons, being first duly sworn according to law, deposes and says: That he is the Attorney of the United States within and for the District and Territory of Hawaii; that he is duly authorized to bring this action; that he has read the above and foregoing Complaint by him subscribed on behalf of the United States of America, and knows the contents thereof, and that the facts therein stated are true.

(Sgd.) ROBT. W. BRECKONS.

Subscribed and sworn to before me this 7th day of March, A. D. 1912.

[Seal]

(Sgd.) F. L. DAVIS,

Deputy Clerk, United States District Court, Territory of Hawaii. [19]

“A.”

WHEREAS the Collector of Customs of the port of Honolulu, Territory of Hawaii, has given notice of J. F. Findlay, Master of the British Steamship “Orteric,” that the said Master has incurred certain penalties on account of alleged violations of “The Passenger Act, 1882” as amended; and

WHEREAS the said Collector has been authorized by the Department of Commerce and Labor of the United States to grant immediate clearance to said Steamship upon a bond being furnished in the penal sum of Fifteen Thousand Dollars (\$15,000),

approved by the United States District Attorney for the Territory of Hawaii, to insure the payment of such penalties for such violations aforesaid as shall be determined by the Department of Commerce and Labor of the United States to have been incurred by the said Master after the presentation, within a reasonable time, by the said Master, or his agents or attorneys, and the officials of the United States at said Honolulu, of the facts, to said Department; and

WHEREAS a bond in the form of these presents and with the sureties therein named, has been approved by said United States District Attorney;

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS: That the said J. F. FINDLAY, as principal, and T. CLIVE DAVIES and W. H. BAIRD, both of said Honolulu, as sureties, are held and firmly bound unto THE UNITED STATES OF AMERICA in the penal sum of FIFTEEN THOUSAND DOLLARS (\$15,000), for the payment of which well and truly to be made, the said principal and sureties do bind themselves, their heirs, executors and administrators firmly by these presents:

THE CONDITION of the within and foregoing obligation is [20] such that if the said principal J. F. Findlay shall pay to the United States of America through the Collector of Customs at the port of Honolulu in the Territory of Hawaii the amount which the Department of Commerce and Labor of the United States shall, upon such presentation of facts, determine that the said principal is

liable for on account of such penalties so alleged to have been incurred, then this obligation shall be null and void, otherwise of full force and effect.

IN WITNESS WHEREOF the said principal and sureties have hereunto set their hands and seals this 22d day of April, 1911.

(Sgd.) JAMES F. FINDLAY. (Seal)

(Sgd.) T. CLIVE DAVIES. (Seal)

(Sgd.) W. H. BAIRD. (Seal)

In presence of

W. M. BUCHUNAN,

G. E. WHITNEY.

The foregoing bond is hereby approved as to form and sureties.

Dated, April 22, 1911.

(Sgd.) ROBT. W. BRECKONS,

United States District Attorney for the Territory of Hawaii.

[Endorsed]: No. 81. (Title of Court and Cause.) Complaint. Filed Mar. 7, 1912. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [21]

[Title of Court and Cause.]

Answer.

Now comes the defendants in the above-entitled cause, by their attorneys, Holmes, Stanley & Olson, and for answer to the complaint herein filed, deny each and every allegation therein contained.

Dated, Honolulu, T. H., March 28, 1912.

(Sgd.) HOLMES, STANLEY & OLSON,

Attorneys for Defendants.

[Endorsed]: No. 81. (Title of Court and Cause.)
Answer. Filed Mar. 28, 1912. A. E. Murphy, Clerk.
By (Sgd.) F. L. Davis, Deputy Clerk. [22]

[Title of Court and Cause.]

COME NOW the parties hereto, by their respective attorneys, and waive a jury trial herein, and agree and stipulate that this cause may be heard by the Court without the intervention of a jury; and further stipulate and agree that said cause may be heard by the Court without intervention of a jury on Monday, the 22d day of April, A. D. 1912.

(Sgd.) ROBT. W. BRECKONS,
Attorney for Plaintiff.

(Sgd.) HOLMES, STANLEY & OLSON,
Attorneys for Defendants.

[Endorsed]: No. 81. (Title of Court and Cause.)
Stipulation. Filed Apr. 20, 1912. A. E. Murphy,
Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [23]

[Decision.]

[Title of Court and Cause.]

January 20, 1913.

1. *Evidence—Parol evidence rule—Extrinsic evidence to show bond's legal object*: In a suit on a bond, though the bond may be capable of being read as contemplating an unauthorized arbitration, yet when extrinsic facts would show the intent of an authorized submission to a Government officer for remission of penalties under

Rev. Stat., sec. 5294, as amended, such facts are admissible in evidence, in order to effectuate the bond when that may be done without varying its terms.

2. *Public officers—Power and authority—Submission to arbitration:* United States officers have no authority, in the absence of statute, to submit to arbitration a controversy as to the fact of violations of law.
3. *Same—Same—Penalties—Remission proceedings—Requirement of bond from applicant:* The Secretary of Commerce and Labor has authority, under Rev. Stat., sec. 5294, as amended, to exact or accept from an applicant for remission of statutory penalties, a bond to secure payment thereof in case of the applicant's disallowance.
[31]
4. *Estoppel—To deny public officer's authority—Penalty—Remission proceedings:* A ship's master violating the Passenger Act of 1882, 22 Stat. 186, as amended, who on his own request and for his own advantage obtains clearance of his vessel under bond for payment of "such penalties as may be determined by the Department (Secretary) of Commerce and Labor to have been incurred," on submission of the facts, and whose pursuant submission admits the violation but sets up alleged extenuating circumstances, is estopped to deny the submission to be an application for remission of penalties within the Secretary's power under Rev. Stat., sec. 5294 as amended, when, otherwise, the master and his

- ship would escape satisfaction of such penalties.
5. *Statutes—Revised Statutes—Conflict with pre-existing laws*: In interpreting the Revised Statutes, resort may not be had to original antecedent acts of Congress except in case of ambiguity of the revision.
6. *Penalties—Remission proceedings—Bond*: As above, paragraphs 1, 3, 4,

At Law: Action of debt on bond.

R. W. BRECKONS, U. S. District Attorney,
for Plaintiff.

C. H. OLSON and I. M. STAINBACK
(HOLMES, STANLEY & OLSON, with
them), for the Defendants. [32]

This is an action of debt to recover \$7,960 on a bond of the defendant Findlay, master of the British steamship "Orteric," as principal, and the defendants Davies and Baird as sureties, conditioned upon the payment to the United States of America through the Collector of Customs at the port of Honolulu, of such penalties as, in the language of this instrument, should be "determined by the Department of Commerce and Labor to have been incurred by the said master" by reason of alleged violations of the Passenger Act of 1882 as amended (hereinafter referred to as the Act): 22 Stat. 186; Act of Feb. 14, 1903, sec. 10, 32 Stat. 829; Act of Feb. 9, 1905, 33 Stat. 711; Act of Dec. 19, 1908, 35 Stat. 583. By stipulation in writing the case was submitted to the Court for determination without the intervention of a jury. From the evidence the facts appear as hereinafter set forth.

On arrival of the British steamship "Orteric" at the Port of Honolulu, April 13, 1911, on a voyage from Oporto and Gibraltar, carrying passengers composed mainly of Portuguese and Spanish immigrants destined for Hawaii, an examination of the vessel was made by customs officers assigned to that duty by the collector pursuant to the provision of the Act, section 11. This inspection resulted in a report of April 17, disclosing violations of the following sections of the Act: 2, relating to berths; 3, light [33] and ventilation; 4, food; 5, hospitals; 6, discipline and cleanliness; 7, posting of notices prohibiting ship's company from visiting steerage quarters. Immediately the collector gave written notice to the master of his liability to penalties in respect to the ship "Orteric" for these violations, specifying them in detail, and also for violations of section 9 relating to passenger manifests. Moreover, this notice stated the maximum penalty in each instance, offering an opportunity "to present any statements desired," and directed attention to section 13 of the Act providing a lien upon the offending ship for these penalties. Thereafter the local agents of the "Orteric" directed to the collector a letter dated April 22, requesting him to cable to the Secretary of Commerce and Labor (hereinafter called the Secretary) for permission to grant clearance to the "Orteric" "upon a satisfactory bond being furnished for the payment of any penalties which may be imposed in respect to the alleged violations of the Passenger Act by that steamer, . . . full particulars regarding the matter to

be furnished to the Department of Commerce and Labor for their determination of what shall be done in connection therewith." On the same day the agents had already directed another letter to the collector, making "application for clearance of the said steamer for Victoria, British Columbia," and "in view of the alleged violations" offering to "furnish an adequate bond covering the same, providing that the facts concerning such alleged violations be submitted to the Secretary [34] for determination." The collector, by cable, notified the Secretary of the application for clearance "under bond covering alleged penalties" and recommended "favorable consideration," to which the acting Secretary replied by cable of April 22, "With approval United States attorney clear 'Orteric,' fifteen thousand dollar bond." The bond in suit, for this amount, was thereupon executed and by the United States attorney was "approved as to form and sureties." The bond recites, by way of introduction, the collector's notice to the master of the latter's having "incurred certain penalties on account of alleged violations" of the Act, and the department's authority to the collector to grant immediate clearance upon the furnishing of an approved bond "to insure the payment of such penalties for such violations aforesaid as shall be determined by the department to have been incurred by the said master after the presentation within a reasonable time, by the said master, or his agents or attorneys, and the officials of the United States at Honolulu, of the facts, to said department." The condition of the

bond is the payment by the master to the United States through the collector, of "the amount which the Department of Commerce and Labor of the United States shall, upon such presentation of facts, determine that the said principal is liable for on account of such penalties so alleged to have been incurred." Upon delivery of the bond to the collector, on April 23, clearance was granted forthwith.

Thereafter the Honolulu attorneys for the master sent to the collector, a letter dated April 27, in which [35] "in order to preserve the rights" of their client, they "formally enter protest against the imposition of the penalties aforesaid and all penalties whatsoever that may be imposed on account of alleged violations" of the Act, but promise to file with the collector as soon as possible "a full statement of the facts concerning the said alleged violations, to be submitted to the Department of Commerce and Labor in order that it may arrive at a proper determination of the matter."

After some extension of time granted to the master for his submission of facts, the collector, on June 14, received from the Honolulu attorneys a letter "submit(ting) for presentation to the Department of Commerce and Labor," the affidavits of the master, the chief officer, the ship's doctor, and one of the nurses of the "Orteric," and "copies of notices in the English, Portuguese and Spanish languages, which were posted according to the above mentioned affidavits as required by said section 7" of the Act, and which the master's attorneys state were "obtained" by them "on board the S. S. 'Orteric' from

the captain and chief officer thereof.” Also, this letter promised an endeavor to have the owners furnish the department with a copy of the ship’s plans and specifications referred to in the master’s affidavit, and asked permission to submit a supplementary presentation of facts concerning the alleged violations of section 3, as to ventilating apparatus, by affidavit or affidavits to be secured immediately upon the return of a Mr. Campbell who was to arrive in Honolulu on June 16, and who was expected [36] to establish inspection and approval of the ventilating apparatus at the port of clearance by emigration officers. There is no evidence before the Court, however, that any submission of the plans and specifications, or any supplementary presentation of facts as to ventilating apparatus, was ever made. A summarization of the affidavits follows.

Section 2, Berths: The master admits the violation of section 2 of the Act in that all single male passengers were, after March 5, not berthed in the fore part of the vessel in a compartment separate from the space or spaces appropriated to other passengers, but on account of a riot between the Spanish and Portuguese male passengers it was, “in order to maintain discipline and prevent bloodshed, deemed mandatory to segregate the Portuguese passengers from the Spanish passengers, and therefore the affiant removed said Portuguese male single passengers from said compartment in the fore part of the said vessel aft.”

Section 3, Light and Ventilation: The master does not attempt to show the ship’s provisions for light

and ventilation to have conformed with the requirements of the Act but deposes to his “belief that the ventilating devices in each compartment occupied by passengers were equal in capacity and utility to the ventilating specifications set forth in section 3 of the Act, as will be more particularly shown by a copy of the plans now in possession of the owners of said steamship, and the specifications [37] attached thereto, to be supplied for use in connection with this affidavit” (but, as above noted, not supplied). On the contrary, the master attempts to bring the case within the concession made by this section of the Act, that “in any steamship the ventilating apparatus provided, or any method of ventilation adopted thereon, which has been approved by the emigration officers at the port or place from which said vessel was cleared, shall be deemed a compliance with the foregoing provisions.” In this behalf, he deposes, “that on the 21st day of February, 1911, the said steamship was cleared from the port of Oporto in Portugal, ; that on the day preceding about 10 Portuguese officials, among whom affiant believes were included Portuguese emigrant officials, carefully inspected the said steamship, , with reference to construction, equipment, food supply, and ventilation, and [the said steamship] was approved in all such respects and otherwise by all of said officials.” As to water-closets the master deposes “that there were sufficient closets in number in proportion to the number of passengers according to the requirements of said section 3,

all enclosed, some of which were located on one side of the upper deck and the others on the other side of said upper deck.” Nothing is said as to the closets being “properly enclosed and located” or “kept and maintained in a serviceable and cleanly condition throughout the voyage,” within the provisions of the Act, though these were subjects of complaint by the collector, and though the point to which [38] the affidavit is especially directed, sufficiency in number of closets, is not made by the collector at all but is conceded by his letter of April 17, and therefore called for no reply or statement in behalf of the ship. Moreover, the benefit of official inspection is not extended by the above exception to the matter of closets.

The affidavit’s introductory statement should here be noted, “that on the 24th day of February, 1911, the said steamship left Gibraltar with about 1,500 Spanish and Portuguese emigrant passengers aboard whose destination was Honolulu; that about 550 of said passengers were Portuguese and the remainder Spanish; and it should be noted that nothing is said as to whether some of these passengers were taken on at Gibraltar—in which case a new and favorable inspection would be required, to bring the case within the benefit of the above exception. The above-mentioned report of the inspectors was in the hands of the Secretary for consideration in this case; it shows that 1,000 of the passengers were taken on at Gibraltar, after there had been taken on at Oporto, three days before, but 300 passengers, and at Lisbon, two days before, only 252 more. So the master,

while claiming exemption, has failed to show that he is within the proviso of section 3,—indeed, has apparently attempted to mislead the Secretary by such a suppression and perversion of facts as would imply an inspection after all, instead of about a third of, the passengers had been taken aboard. [39]

Section 4, Food: The master here also deposes by way of concession and justification, or confession and avoidance, “that while milk for infants and children was served regularly only twice a day, nevertheless mothers of such infants and children were at all times supplied upon application with condensed milk at other times, and often served at irregular times without application.”

Section 5, Hospitals: The master deposes that the hospital compartments were “ventilated by large skylights and portholes,” but does not meet the complaint that the ventilation was insufficient. He also deposes to the utilization as hospitals of two large compartments aggregating more than 1,500 square feet, but gives details showing that the access of air was not direct and was cut off in rough weather. On this point the affidavit appears to dodge the question of the suitability of the regular hospital and to attempt to divert attention therefrom to two special, make-shift hospitals.

Section 6, Discipline and Cleanliness: The master makes no denial of the alleged filthy condition of the ship, but deposes that he, the chief officer, the ship's doctor, and an interpreter, almost every day, and one or more of them every day, inspected the ship and passengers and “warned and directed the pas-

sengers to keep themselves in a cleanly condition and to stay on the upper deck as much as possible," and "directed said passengers to air their baggage and bedding whenever the weather would permit, [40] but with few exceptions the said passengers refused to do so, stating that they feared their belongings would be stolen," and he deposes that on account of the great number of passengers, the crew could not air the bedding and baggage without the passengers' assistance, and that at all times the crew "was engaged in cleaning the decks and compartments and did all in that respect that could reasonably be done." The master thus, in effect, regards the statutory duty of the ship as performed by its officers' merely directing the passengers to maintain cleanliness. The ship's condition of disorder and filth on arrival at Honolulu is attributed to excitement of the passengers in view of the approach of landing and end of the voyage,—who threw the remnants of their breakfast about the floors and decks, instead of overboard as they had customarily done theretofore, and also to the tearing of cloth from mattresses in order to make bags for their belongings, with consequent scattering of the mattress-stuffing. And it is stated, that it was at the collector's direction that the ship was left in this condition for several days after docking, a precaution, by the way, which enabled the inspectors, and the grand jury who also visited the ship, to see conditions *in statu quo*.

The master then deposes to the posting of copies of section 6 of the Act, in the Portuguese and Span-

ish languages, in all of the companionways and in various parts of the vessel; but states that in the course of the voyage many of them were torn down by passengers, and that such [41] notices were again posted about two weeks before reaching Honolulu; also that very few of the passengers could read,—as if the Act made this posting at all dependent upon the literacy of the passengers.

Section 9, Passengers Manifest: The master admits that “the shifting of the passengers in order to segregate the Spanish from the Portuguese, resulted in some confusion, making it impossible for affiant to include in the list of passengers the exact compartments and spaces occupied by them thereafter.”

The affidavit of the chief officer “confirms in all respects” the affidavit of the master, as does the affidavit of the ship’s doctor. The doctor also deposes that all compartments and decks were swept not less than twice daily, and were treated daily with a suitable disinfectant; that he would not permit the washing of apartments occupied by passengers because in his opinion and from the experience of physicians in charge of emigrant vessels, such washing results in unavoidable dampness highly detrimental to health. He deposes that “any and all accumulations were rendered physically harmless and innocuous by disinfectants,” and “the sleeping apartments were scraped with shovels every day and swept,” and “most of the litter found on board at Honolulu, was the result of food and rubbish and the contents of mattresses being

thrown or strewn about the deck by the passengers in their excitement and haste to land." He says that "the temporary or additional hospital quarters [42] were, in the opinion of the affiant, well suited to that purpose considering the circumstances," but though deposing that he "directly superintended all of the sanitation and sanitary measures," he says nothing about the regular hospital and its ventilation. "The mortality on board said vessel," he attributes "very largely to the concealment by parents of the ailments of their children and their refusal to submit them to medical treatment." "While," as he says, "milk was served regularly only twice a day, nevertheless condensed milk was served at irregular times each day to the mothers for the use of such children, both upon application and without application"; "constant inspection was made by affiant, and milk supplied in all cases where it was found necessary," and "a quantity" (stating it) of condensed milk was provided "ample for the requirements of the children and nursing mothers." The water supply for bathing and washing of said passengers was unlimited, and the usual accommodations for washing existed.

One of the nurses deposes that "she assisted throughout said voyage in caring for the passengers who were ill and for infants; that milk was served twice daily regularly and at irregular times in addition whenever desired by the mothers of infant children and also whenever it appeared necessary to the hospital staff; that affiant believes that

milk in ample quantities was served at all times." Her statements as to hospitals and ventilation is the same in substance as that of the master, whom she also confirms as to the riot and the consequent segregation of Portuguese [43] and Spanish.

The collector thereupon, on June 17, forwarded to the Secretary, the master's showing of affidavits and copies of posted notices, and the collector's own showing which consisted of the bond in suit, the above-described letters and cablegrams (by original or copy), also the inspector's report of the vessel's condition, and a letter of the collector to the United States district attorney at Honolulu dated April 17, transmitting this report and calling attention to the violations of the Act, a letter (copy) of April 18 of the Portuguese consul at Honolulu to the governor of Hawaii protesting against the sanitary conditions of the vessel, the report (copy) of the grand jury for the April, 1911, term of this court adverse to the master on the same points as covered by the above-described letter of the collector to the master. And a few merely formal and immaterial letters of acknowledgment and of transmission between the collector and other officials were included among the papers presented to the Secretary. He also had before him a letter directed to the department by the Washington attorney for the owners, dated April 22, but not received until two days later, and perhaps of no bearing on the question of the object of a bond the negotiations for which had already been consummated by other, and the leading, attorneys in the matter at Honolulu, but which in fairness to

the respondents should nevertheless be mentioned as possibly not so equivocal as the bond and the preceding Honolulu correspondence, and as more clearly capable of [44] being read as contemplating some kind of an "adjudication," i. e., arbitration, by the Secretary. Though, under all the circumstances, the conclusion is inevitable that, even if this letter did imply an arbitration, it would not express the actual object of the negotiations. This conclusion is borne out by several considerations. In the first place, the Washington attorney had no part either in the preparation of the bond, or of the submission pursuant thereto, i. e., of the matter which the bond was intended to cover and which would indicate the bond's purpose; and it may be fairly found from the evidence, direct and circumstantial, that any light of his statements would be at most no more than dimly reflected light. Even giving his use of the word "adjudication" a strict sense, certainly not called for by any controlling fact or presumption of fact or of law (but quite the contrary), he, still, was not in as good position to characterize the proceedings as were those others who were active in the actual negotiations and on the field, and whose request for clearance discloses that the object of the proposed submission of "full particulars regarding the matter," was the Secretary's "determination of *what shall be done in connection therewith*" (agents' letter of April 22, above). Furthermore, while it might be a possible, though it is by no means a necessary, nor even the probable or reasonable, inference from the Washington at-

torney's letter of April 22, that it was he who had the first advice and direction from [45] the owners of the vessel and so himself initiated the proceedings; still it is important to repeat that the Honolulu attorneys were the ones on the ground and that it was really their application for clearance, or that of the local agents under their guidance, which was acted upon, and not the application of the Washington attorney, whose letter, as suggested above, did not reach the department until two days after the vessel had cleared,—sent on a Saturday and not received until the following Monday (as shown by the department's receipt stamp on the face of the letter). Also, after the submission to the Secretary this attorney, though specially requesting by letter of July 11, further time for presentation of a "Written brief of his contentions" to be "supplement(ed) by a verbal presentation" of "the points which he desires the Department to consider," nevertheless failed to present any defense of the master or any argument in support of a defense,—indeed, did not appear at all, as he would naturally have done if the consideration of the Secretary had been *quasi-judicial* instead of executive, i. e., in the nature of judgment on disputed facts rather than of pardon for admitted acts.

This letter of April 22 recites the vessel's detention for alleged breaches of the Act, the details of which are unknown, and in view of the time required for this attorney and the Secretary to fully ascertain the facts [46] and of the urgent importance of minimizing delay (as a cargo waited at

Seattle), requests the department to instruct the collector by cable to report of cable "the cause of the detention with such details as may be necessary to enable the department to act on the owner's request, which is that permission be granted to the vessel to proceed on her voyage "upon her master or Honolulu agent entering into bond for the making good of any penalty found to be due either by the vessel or the master, and that upon the coming in of a formal report of the matter the questions involved be then adjudicated upon after a hearing."

The collector, in his letter of June 17 transmitting the papers in the case, reported penalties aggregating \$7,960 as follows: "Section 2, \$5 for each statute passenger,—1,242 at \$5,—\$6,210; section 3, penalty of \$250; section 4, misdemeanor reported to United States attorney; section 5, penalty of \$250; section 6, penalty of \$250; section 7, misdemeanor reported to United States attorney; section 9, penalty of \$100." And it will be observed that in the consideration of the case, no action was taken as to the violations of a criminal nature, alleged in the collector's letter notifying the master of his liability, namely, breaches of sections 4 and 7 of the Act, which are misdemeanors.

On December 4, 1911, the acting Secretary directed to the collector a letter in this matter, which he characterizes as "the application of James Findlay, master, for relief from the penalties incurred in the case of the steamer [47] 'Orteric' for violations of the Passenger Act," namely, sections 2, 3, 5, 6 and 9, but not sections 4 and 7 involving misde-

meanors. After reviewing at length the report of the grand jury, the acting Secretary concludes:

“From the papers submitted, it is evident that this vessel with 1,242 statute passengers was navigated on a voyage of eight weeks under all conditions of weather in violation of practically all of the provisions of the passenger Act having to do with the health, comfort, and well-being of the passengers. The death of 57 children during the voyage marks this as the worst case ever submitted to the Department. The sexes were not properly segregated during a large portion of the voyage, the master stating that the confusion was such that it was impossible for him to state in the manifest the exact compartments and spaces occupied by the various passengers. The ventilation of the ship appears to have been wholly inadequate, this lack of ventilation in the opinion of the grand jury, increasing the rate of mortality. Ill-ventilated hospital facilities without adequate equipment were furnished; the manifest of the vessel was not completed, and the sanitary conditions of the vessel were inexcusable. The Department concurs in the following extract from the report of the Grand Jury:

“ ‘We cannot emphasize too strongly the necessity for the observance of the regulations requiring vessels to be kept in a clean and sanitary condition. When poor immigrants, perhaps unaccustomed to modern methods of sanitation, are brought into a tropical climate such

as Hawaii, not only their own good, but the good of the community in general is subserved by a rigid insistence on compliance with the law.'

"In the opinion of the Department, penalties aggregating \$7,960 were incurred in this case for violation of the sections enumerated and it declines to intervene in behalf of the offenders."

Due notice of this determination was given to the principal and sureties and demand made for payment of \$7,960 covering the above penalties, but such payment the obligors have refused and neglected to make. [48]

When the action came on for hearing, the evidence first submitted consisted merely of the execution and delivery of the bond, the determination of the acting Secretary, notice thereof to the obligors and demand for payment, and the breach of the bond's condition,—all on the theory that the undertaking was in any event valid as a common-law obligation. After study of the cases as thus submitted, I came to the conclusion that the bond could not be sustained on its face, so far as concerned the possibly apparent (but not necessarily exclusive) nature of the condition as one for the payment of such sum as the department or its chief officer, should determine on an arbitration; in other words, the bond on its face seemed capable of the implication; and this the first apparent or natural implication, of such action by the Secretary as would amount to the exercise of judicial functions; i. e., an arbitration between the United States and the master of the

“Orteric,” in which, also, the arbitrator was an executive officer not only of the Government but of the department particularly interested. Accordingly, at the Court’s suggestion, the Government moved to re-open the case for the introduction of further evidence, to show the exact nature of the whole transaction between the representatives of the vessel and the officers of the Government. Also, in the consideration of the evidence, a suspicion arose, from the opening statement of the acting Secretary’s letter of December 4, characterizing the proceedings as an “application for relief from penalties incurred,” as well as from his concluding statement of “declin(ing) to intervene in behalf of the offenders,” that the bond contemplated [49] not an arbitration of any controversy, not a *quasi*-judicial determination of disputed liability for penalties, but a proceeding for remission of penalties, or at least for relief from the legal effect of admitted acts, done, however, under alleged extenuating circumstances.

In fairness, it should be said, here, that any conclusions of this opinion, as to the character of the proceedings, are based entirely on what was done therein by the master and his witnesses and attorneys, their “practical construction,” and not in the least on the acting Secretary’s characterization of the proceedings in his letter of December 4,—which characterization is, for our purposes, assumed to be mere irrelevant opinion, or hearsay; though without committing myself to an opinion either way, it is possible that something could be said in support of its evidential value. No contention is made on be-

half of the obligors that the collector ever regarded the proceedings as anything but a submission for mitigation; and any such contention would be contrary to the express language of his letter of June 17, transmitting to the department the showing in behalf of the respective parties.

The motion to re-open was granted, and over the objection of defendants' counsel on the ground of violation of the parol evidence rule, the facts other than those proved at the first hearing were disclosed as above set forth. This extended review of the whole transaction has seemed necessary in fairness to all parties, and also advisable in order to [50] make the reasons for my conclusions fully understood.

This course of hearing further evidence was taken deliberately, and seemed an enlightened application of the parol evidence rule, within the rational limits marked by Mr. Wigmore. See 4 Wigmore on Evidence, sec. 2462, pp. 3476, 3477; sec. 2463, p. 3488; sec. 2465, pp. 3490, 3492; sec. 2470, p. 3499; 5 *Id.*, sec. 2462, note 8. In the language of Mr. Wigmore's Pocket Code of Evidence, "The ultimate standard of interpretation is the sense employed by the party or parties doing the legal act," sec. 1958, rule 222, and in resorting to the "species of usage" which may be employed "in ascertaining this ultimate standard," the Court may adopt even "a sense variant from that of general usage," upon being "persuaded (1) that such sense exists in some special or personal species of usage, and (2) that the party was employing that other species of usage," secs. 1959, 1960;

and “the sense supplied by general usage, and provisionally adopted,”—(“as a means of attaining (not of supplanting or of competing against) the ultimate standard, namely, *the sense actually used by the party or parties to the act,*”)—“must be rejected, as soon as it is made to appear that there exists some other sense in a special or personal usage which was followed by the party or parties in the particular case,” sec. 1961, with sec. 1960 interpolated. Indeed, Mr. Wigmore in his edition of Greenleaf on Evidence, uses the language of Professor Thayer to suggest as “natural” a “free and full range among extrinsic facts in aid” of “the process of interpretation.” 1 Greenleaf on Evidence, 16th ed., [51] sec. 305j; and see *Id.*, sec. 305k. By this test, it appears to my satisfaction that the parties did not intend a submission in the sense in which the words of the bond might naturally be first taken, i. e., a submission of facts with the object of a determination of the master’s guilt or innocence of the law’s violation,—an arbitration, but that the parties had in view a submission of facts with the object of a remission of the penalties to which the actual violation of the law had made the master confessedly liable. And not only do the facts, admitted over counsel’s objection, support this reading of the bond, but also the presumption of right-acting (the most universal presumption of life) leads me to disregard the superficial or first apparent sense of the bond’s language. For, to posit an arbitration is to read the bond as contemplating an unauthorized act. *Hobbs v. McLean*, 117 U. S. 567, 575, 576;

Delaware &c. R. Co. v. Kutter, 147 Fed. 51, 62; United States Fidelity &c. Co. v. Board of Com'rs, 145 Id. 144, 148, 149; 17 A. & E. Enc. L., 2d ed., 17, 18. And see *Cooke v. Graham's Admr.*, 3 Cranch, 229, 235, in which Chief Justice Marshall declares that in "many cases on the construction of bonds the letter (even) of the condition has been departed from, to carry into effect the intention of the parties."

As a general rule, in the absence of an enabling statute, public officers are without authority to submit to arbitration a controversy, in which the Government is a party. [52]. In support of this proposition, a mere reference must suffice to the following authorities as in point or suggestive: *Jones v. Howard*, 4 Mich. 446, 448, 449, for the general principle that "officers who are created by statute must confine their acts within its provisions"; *Mechem on Public Offices and Officers*, sec. 511, and n. 5, secs. 505-507; the valuable decision of Circuit Judge Woodbury in *United States v. Ames*, 1 Woodb. & M. 76, 24 Fed. Cas. 784, 789, 790, No. 14,441, applying this principle to an arbitration submission; *Morse on Arbitration*, 30; *Child v. United States*, 4 Ct. Cl. 176, 184; *District of Columbia v. Bailey*, 171 U. S. 161, 176, in which Mr. Justice White, though viewing liberally the contractual capacity of certain officers as implied from other recognized powers, yet holds that the "mere absence of a statutory inhibition" is in general no justification for the exercise of the power of submission, but that the officer must first have his authority from that legislative body

(municipal, state or national), which is his guardian if not his parent; *Benjamin v. United States*, 29 Ct. Cl. 417, 419; *Child v. United States*, *supra*. See *Brannen v. United States*, 20 Ct. Cl. 219, 224. (It is worth while to note in passing that the value of the Court of Claims reports as a source of authority on many phases of the powers of public officers, has apparently been overlooked [53] by the Courts and law-book writers.) And the reasoning of the decisions on the power of public officers to compromise would seem to add some support to the principle, applied in the above-cited cases to the power to arbitrate,—regardless of distinctions between compromise and arbitration. See, e. g., the opinion of Judge Benedict in *United States v. George*, 6 Blatchf. 406, 25 Fed. Cas. 1277, 1279, 1280, No. 15,198.

It may be observed by the way that the violations of statute out of which the mooted transaction arose, though close to the border-line of the *quasi*-criminal, are nevertheless the subject of a civil action for recovery of the penalties incurred (*Jacob v. United States*, 1 Brock. 520, 13 Fed. Cas. 267, No. 7157; *Stearns v. United States*, 2 Paine, 305, 22 Fed. Cas. 1188, No. 13,341; *Boyd v. Clark*, 13 Fed. 909; 16 Enc. Pl. & Pr. 231–239), especially if the parties so choose to regard them (see *Moller v. United States*, 57 Fed. 490, 495); so that the bond would not be held invalid on the score of a prohibited arbitration of a subject of criminal prosecution (2 A. & E. Enc. L., 2d ed., 557, 558; 3 Cyc. 595; 5 Enc. L. & P. 38).

Also, it should be noted that, assuming an arbi-

tration for purpose of discussion, the fact of the arbitrator's being practically one of the very parties, or at least the agent of a party, does not in any way control my view of the bond on its face; for the principal under the bond has waived any objection of disqualification for interest, because he has, of course, entered into the obligation with full [54] knowledge of the arbitrator's being an agent of the Government. 2 A. & E. Enc. L., 2d ed., 637; 3 Cyc. 619; 5 Enc. L. & P. 88. See 3 Cyc. 617, n. 48.

Furthermore, even if there were plausibility in the argument made in behalf of the obligors, that the giving of a bond was enforced by circumstances (the urgent importance of getting the ship away for its waiting cargo, etc.), i. e., the claim of duress, involuntariness, such argument is quite untenable under the facts of the case, for it was the obligors themselves who proposed and urged this very procedure, and for their own convenience.

But we now come to the points which are more seriously regarded as vital. The district attorney insists that, in any event the bond, even if the contemplated arbitration and not penalty remission, is good on its face as a common-law obligation, and maintains that the granting of clearance of the vessel, at the request of the master, constitutes a good consideration to support this obligation. This argument cannot be permitted to stand in the face of the rule that public officers are without authority to submit to arbitration. It is illogical, futile, to lay down such a rule of restraint, and then hold that, in spite of any want of power, an unauthorized act may be

given effect by the officer's exaction or acceptance of a bond covering that act. This appearing to be a sound, indeed the only possible, application of the rule, the mere fact of there being a just [55] consideration, in the grant of the requested clearance, cannot be urged to the rule's undoing. An extreme illustration may make this more clear; if the fact of a *quid pro quo* in the grant of clearance may justify an unauthorized submission to arbitration in these "civil" infractions of the Passenger Act, it would equally well justify a submission to arbitration of alleged criminal breaches of this statute punishable by imprisonment, e. g., under section 4. And, of course, the argument is not sound, according to one of the most elementary principles of the law of contracts. Anson's English Law of Contracts, 2d Amer. ed., by Huffcut, 12, sec. 10, subd. 5; Harriman on Contracts, 2d ed., sec. 228. The argument overlooks the distinction between subject matter (or object) and consideration: validity of the latter cannot cure illegality of the former. See 1 Page on Contracts, sec. 325.

Moreover, the argument ignores the fundamental policy of the law relating to the powers of public officers. Counsel seems to lose sight of the broad principle of policy in his zeal to see justice done in this particular case. Indeed, there is a conflict of policies here,—the policy of securing in this particular case punishment of the offending ship and master, and the policy in general of not countenancing an abuse of power by a public officer even in a good cause. The former is a matter of insignificance

compared with the latter. Mayor Gaynor, late Justice of the Supreme Court of New York, has emphasized this distinction in a letter worthy of quoting [56] here. In reply to a zealous guardian of public morals, who besought him to "stop" certain moving-picture exhibitions of prize-fighting, he writes:

"Will you be so good as to remember that ours is a Government of laws and not of men? I am not able to do as I like as mayor. I must take the law just as it is, and shall not take the law into my own hands. You say you are glad to see that the mayors of many cities have 'ordered' that these pictures shall not be exhibited.

Who set them up as autocrats? If there be some valid law giving any mayor such power, then he can exercise it; otherwise not. The growing exercise of arbitrary power in this country by those put in office would be far more dangerous, and is far more to be dreaded, than certain other vices that we all wish to minimize or be rid of. People little know what they are doing when they try to encourage officials to resort to arbitrary power." Mayor Gaynor's Letters, *American Magazine*, January, 1913, 49. See Sir Courteney Ilbert's "Legislative Methods and Forms," pp. 38-40; A. Lawrence Lowell's "Governments and Parties in Continental Europe," p. 44; Jeremiah Black, *Essays, etc.*, p. 598.

As to the suggestion of an estoppel against the obligors to deny a power in the collector or his su-

perior officer to submit to arbitration (i. e., viewing the bond according to an intention possibly apparent on its face, of an arbitration), it must be remembered that, “estoppel of whatever kind is subject to one general rule, that it cannot override the law of the land: for example, a corporation [57] cannot be estopped as to acts which are *ultra vires*.” 9 Enc. Britt, 11th ed., 801, tit. “Estoppel.” And see the pregnant language of *Collins v. Benbury*, 3 Ired. L. (No. Car.), 285, 38 Am. Dec. 722, 726, to the effect that what is merely void cannot estop. It would be of doubtful wisdom as a precedent, though it might be fair enough to the obligors in this particular case, to hold that parties by estoppel can create a power not possessed by a public officer, to submit to arbitration.

The finding has already been intimated, of a submission for the purpose of obtaining remission of the penalties alleged by the collector to have been incurred by the ship and master. While the submission was somewhat informal,—lacking even a regular petition with prayer for relief, yet I feel satisfied, beyond any doubt, of the truth of the conclusion of fact that the proceeding was intended with a view to obtaining the exercise of leniency. Such is the only reasonable, satisfactory, answer to the questions: If the master’s showing of facts was not a submission for the purpose of obtaining remission of the alleged penalties, why did he set up extenuating circumstances? If it was an arbitration of disputed facts, which was contemplated, why did the master not show facts in defense, instead of facts in mitigation?

Here is a real estoppel. If the master has, as I find, actually regarded the proceeding covered by the bond, as a submission for remission of penalties, or led the Government's officers from the beginning to so understand [58] his intent, then why seek a principle of law to support a contrary intent? Furthermore, it is undeniable that the master and his attorneys were endeavoring to avoid liability by reason of alleged extenuating circumstances; and so, in any event, even though it be possible that such circumstances might, as the defendants claim, be adapted to a defense under an arbitration,—though it does not appear that it was ever urged *as a defense*, the department was justified in treating the submission as it did, i. e., as a submission within the authority of the Secretary to consider and pass upon under section 5294 of the Revised Statutes as amended. Any estoppel in the case lies here; and the fact that the Government permitted the vessel to clear and go beyond the reach of its courts and of the local grand jury, supplies the element of “prejudice” or “injury” which would follow denial of such estoppel. 11 A. & E. Enc. L., 2d ed., 436–438; 16 Cyc. 744. In passing, the grand jury's statement may be noted, that an indictment would have been found but for “the action of the owners of the vessel in *frankly submitting the facts* to the Department of Commerce and Labor for its determination and agreeing to abide by whatever decision that department might make.”

The objections, made in this court, in behalf of the defendants, to the evidence submitted to the Sec-

retary by the collector, as being hearsay and immaterial, are, it would seem, untenable. According to my theory of the case, it was proper to see just what was before the Secretary, [59] just what was submitted to him by the parties, so that from the matter submitted a finding might be made as to the character of the submission. See authorities on evidence, *supra*; also Wigmore's Code, secs. 1969, 1972; *Merriam v. United States*, 107 U. S. 437, 441; *Rock Island Railway v. Rio Grande Railroad*, 143 U. S. 596, 609. Objections might technically be well taken not only to the inspectors' report, the grand jury report, the official letters, etc., submitted by the collector, but also to the affidavits, the copies of posted notices and the attorneys' letter verifying the source and contents of these notices and the fact of their posting, submitted by the master. But it would be an unwarranted refinement of technicality to give heed now to the complaints of the master who had himself initiated the proceedings and throughout had made no objection but had countenanced their informality. See *Duvall v. Sulzner*, 155 Fed. 910, syll. 2, 917, 918. If I were called upon in this suit to pass upon the soundness of the Secretary's admission of evidence precedent to his ruling on the submission for leniency, I would still hold that the admission of everything submitted by the collector was harmless error, and that the master stood "convicted out of his own mouth" in the affidavit which he himself swore to and presented to the department. [60]

But on this aspect of the case, counsel for the defendants argue that the power of the Secretary to

remit is wanting, quite as much as the power of the collector or the Secretary to submit to arbitration; and the earnest contention is that the provision of the Revised Statutes, sec. 5294, as amended, upon which is founded the Secretary's power to remit, does not apply to any other subject than those within the purview of the power of remission given by the original act of Congress, 16 Stat. 458, embodied in this section of the Revised Statutes, to wit, "any fine or penalty provided for in this act," etc. Now, this original act, of February 28, 1871 (of which section 5294 of the Revised Statutes represents section 64), entitled "An act to provide for the better security of life on board of vessels propelled in whole or in part by steam, and for other purposes, 'excepted from its provisions' vessels of other countries," Revised Statutes, sec. 4400, Act of 1871, sec. 41, 16 Stat. 440. And so, if we must be guided not by what the present statute, Revised Statutes, sec. 5294, says on its face, but by what the original statute says, then it is conceded that the power to remit does not apply to the "Orteric," which is "a vessel of another country." But the argument overlooks the provisions of sections 5595 and 5596 of the Revised Statutes, which declare that these Revised Statutes "embrace the statutes in force on the 1st day of December, 1873, *as revised*," and that "all acts of Congress passed [61] prior" to said dated, "any portion of which is embraced in any section of said revision are hereby repealed, and the section applicable thereto shall be in force in lieu thereof." See *United States v. Tucker*, 122 Fed.

518, 523. Accordingly, in *United States v. Bowen*, 100 U. S. 508, 513, the federal Supreme Court held “that the Revised Statutes must be treated as a legislative declaration of what the statute was on the 1st of December, 1873, and that when the meaning was plain the courts could not look to the original statutes to see if Congress had erred in the revision,” —which “could only be done when it was necessary to construe doubtful language.” *Viethor v. Arthur*, 104 U. S. 498, 499; *Arthur v. Dodge*, 101 Id. 34, 36; *Deffebach v. Hawke*, 115 Id. 392, 402, in which Mr. Justice Field holds that “no reference can be had to the original statutes to control the construction of any section of the Revised Statutes, (even) although in the original statutes it may have had a larger or more limited application.” *Cambria Iron Co. v. Ashburn*, 118 Id. 54, 57; *Hamilton v. Rathbone*, 175 Id. 415, 419, 420; *The Brothers*, 10 Ben. 400: 4 Fed. Cas. 318, No. 1,968; *United States v. Sixty-five Vases*, 18 Fed. 508, 510. The suggestion of Judge Blatchford to the contrary in *The L. W. Eaton*, 9 Ben. 289, 15 Fed. Cas. 1119, 1123, col. 2, No. 8,612, has thus been overruled. See, also, 1 Lewis’ *Sutherland on Statutory Construction*, 2d ed., sec. 271, 2 Id., sec. 450. It is sometimes quite a violent presumption that everyone “knows the law”; and to insist that where the law has been revised the average man shall know not only the law as embodied in [62] the revision but also as contained in all the precedent statutes, would be to make law revision a burden instead of a help to an already law-enfettered public. Chancellor Zabriskie some years before had ex-

pressed the germ of this truth when he said in *Keyport Steamboat Co. v. Farmers' Transportation Co.*, 15 N. J. Eq. 13, 24. "The only just rule of construction, especially among a free people, is the meaning of the law as expressed to those to whom it is prescribed, and who are to be governed by it." See, also, *In re Suekichi Tsuji*, 4 U. S. Dist. Ct. Haw. ——. In the statute here in question the language is not doubtful; and, so, we may not look elsewhere, but must read the provision as applying to the remission of penalties under laws relating to vessels, irrespective of the nationality of the vessel concerned. It may be noted that section 5294, as amended, is even broader than originally, now applying to penalties relating to "vessels" instead of "steam-vessels." 28 Stat. 595; 29 Id. 39.

Finally, counsel for the defendants would at all events save their case by the contention, that "even if the Secretary could remit a fine, that would not give him or the collector of customs the power to impose a fine." They say, "no penalty can be imposed upon the master until there has been a judicial determination of his liability," and in spite of the bond, the parties are left just where they started. But, we need not take the time to determine whether the collector or the Secretary has the power to [63] "impose" a penalty. See 17 Ops. Atty. Gen. 282, 283, 284; 24 Id. 583, 588. Here, we have an admission by the master of the alleged violations of statute: See summary of his affidavit submitted, and discussion thereof, *supra*; and where a party admits his wrong, as he necessarily must in making an ap-

plication for remission of penalty (The Princess of Orange, 19 Fed. Cas. 1336, 1339, 1340, No. 11,431; United States v. Morris, 10 Wheat. 246, 295), I can see no reason nor justice in giving him this extra "bite at the cherry" so that he may have two chances to clear himself instead of the one chance of the usual fair trial by his peers. A reasonable and just view seems to me to be this: Where the Secretary has the power to remit, he may in order to prevent the wrongdoer's playing fast and loose with him, exact a bond as an assurance of good faith and to secure, in case of denial of remission, full satisfaction of the penalty incurred by him and from which he asks to be relieved. This view finds support in the following cases, among many: United States v. Garlinghouse, 25 Fed. Cas. 1258, 1260, No. 15,189; Neilson v. Lagow, 12 How. 97, 107, 108; United States v. Hodson, 10 Wall. 395, 405-408, 409; United States v. Mora, 97 U. S. 413, 419-421, 422; Rogers v. United States, 32 Fed. 890; Great Falls Mfg. Co. v. United States, 18 Ct. Cl. 160, 195. If the case were one of appeal from an admitted judgment of a lower court, but the statute made no provision for an appeal bond, there would not, I think, be the slightest hesitation by any court to hold that it had power to make a rule requiring [64] the appellant to give a bond to secure performance in case of an affirmance of the judgment from which he sought relief. The case here is no different: the power to accept or require such an undertaking is an administrative power fairly and reasonably incident to the power to remit, or refuse to remit, upon

consideration of facts presented as the basis for desired remission.

The contention that "no penalty can be imposed" without "a judicial determination of liability" is contrary to the opinion of highest authority, judicial and executive, holding that the powers of the Secretary with reference to remission of penalties may be exercised either before or after judgment. *The Laura*, 114 U. S. 411, 416; *United States v. Morris*, 10 Wheat. 246, 295, 296; *Peacock v. United States*, 125 Fed. 583, 588; 17 Ops. Atty. Gen. 282, 283, 284. See 24 Ops. Atty. Gen. 583, 588.

Wherefore, I find for the plaintiff. Let judgment be entered accordingly.

(Sgd.) CHAS. F. CLEMONS,
Judge, United States District Court.

[Endorsed]: No. 81. (Title of Court and Cause.)
Decision of Clemons, J. Filed Monday, Jan. 20,
1913. A. E. Murphy, Clerk. By (Sgd.) F. L.
Davis, Deputy Clerk. [65]

[Title of Court and Cause.]

Motion in Arrest of Judgment.

Come now the defendants in the above-entitled cause and move that judgment be arrested on the grounds that the declaration herein does not state facts sufficient to constitute a cause of action.

Dated, Honolulu, Feb. 5, 1913.

JAMES F. FINDLAY,
T. CLIVE DAVIES and
W. H. BAIRD.

By HOLMES, STANLEY & OLSON.

Their Attorneys.

To R. W. Breckons, Attorney for Above-named
Plaintiff:

TAKE NOTICE that the foregoing Motion will be presented for hearing and determination before the Honorable C. F. Clemons, Second Judge of the United States District Court for the Territory of Hawaii, at his courtroom in Honolulu, on Monday, the 10th day of February, 1913, at 10 o'clock A. M., or as soon thereafter as counsel may be heard.

HOLMES, STANLEY & OLSON,
Attorneys for Defendants. [66]

[Endorsed]: No. 81. (Title of Court and Cause.)
Motion in Arrest of Judgment. Filed Feb. 5, 1913.
A. E. Murphy, Clerk. By (Sgd.) Wm. L. Rosa,
Deputy Clerk. [67]

[**Memorandum Opinion on Motion in Arrest of
Judgment.**]

[Title of Court and Cause.]

May 13, 1913.

Suretyship—Construction of bond—Surety's liability: Though the liability of a surety be a matter *strictissimi juris*, yet his undertaking is to be construed by the same rules as other contracts

and gauged by the fair scope of it on terms,—and, if possible, so as to be upheld.

Debt on bond: Motion in arrest of judgment.

R. W. BRECKONS, United States District Attorney, for Plaintiff.

I. M. STAINBACK, of HOLMES, STANLEY & OLSON, for Defendants. [73]

The defendants move in arrest of judgment, “on the ground that the declaration does not state facts sufficient to constitute a cause of action.”

In this behalf it is contended that the word “alleged” in the condition of the bond, contemplating a determination of “penalties so alleged to have been incurred,” implies *disputed* liabilities and, so, can refer only to an arbitration, which the Department has no authority to make.

This point is disposed of at length in the decision in question.

Also, it is contended, that, from the standpoint of the sureties, as to whose contract the rule of strict construction applies, there can be no liability under this bond; counsel citing *Miller v. Stewart*, 9 Wheat. 680; *Legget v. Humphrey*, 21 How. 66, and *Long v. Pike*, 27 Ohio St. 498.

These authorities support the rule that “the contract of a surety is to be construed strictly, and is not to be extended beyond the fair scope of its terms,” and that “a surety may stand on the terms of his undertaking.” My decision had in full view the “fair scope” of the bond’s terms, and applied the distinction, overlooked by counsel, between the rule of the surety’s strict liability on the one hand and

rules of construction on the other. This difference is so well expressed by a leading American work on suretyship, that scarcely more than a mere reference need be made [74] thereto: 1 Brandt, Suretyship, 3d ed., sec. 107. The contract of the sureties here is “to be construed by the same rules as other contracts are.” The rules of evidence and the rule of estoppel and the other rules applied in my decision against these sureties, have full force,—and not the least, the rule that in construing an agreement, such a meaning will be applied to its language as to uphold it if possible. See *Id.*, sec. 103, and notes. Also, Stearns, Suretyship, secs. 18, 19.

The motion in arrest is denied.

(Sgd.) CHAS. F. CLEMONS,
Judge, United States District Court.

[Endorsed]: No. 81. (Title of Court and Cause.)
Memorandum Opinion of Clemons, J. Filed Monday, Dec. 22, 1913. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [75]

[Title of Court and Cause.]

Motion for Rehearing.

Come now the defendants herein and move this Honorable Court for a rehearing of the above-entitled cause on the following grounds, to wit:

1st. That the decision is contrary to the law and to the evidence and to the weight of the evidence;

2d. That the Court erred in finding that the defendants applied for the remission of an admitted penalty;

3d. That the Court erred in finding that the contract of the defendants was not a contract to submit the question of liability to the determination of the Department of Commerce and Labor;

4th. That the Court erred in admitting evidence offered by the plaintiff, to which exceptions were duly taken, as appears by the transcript of evidence herein;

5th. That the Court erred in admitting certain letters and documents alleged to have been transmitted to the Secretary of Commerce and Labor by the Collector of Customs for the Port [76] of Honolulu, to which exceptions were duly taken.

JAMES F. FINDLAY,

T. CLIVE DAVIES,

W. H. BAIRD,

By HOLMES, STANLEY & OLSON,

Their Attorneys.

May 13, 1913.

To R. W. Breckons, Attorney for Above-named Plaintiff:

Take notice that the foregoing motion will be presented for hearing and determination before the Honorable C. F. Clemons, Second Judge of the United States District Court for the Territory of Hawaii, at his courtroom in Honolulu, on _____ the ____ day of February, 1913, at ____ o'clock ____ M., or as soon thereafter as counsel may be heard.

_____,
Attorneys for Defendants.

[Endorsed]: No. 81. (Title of Court and Cause.)
Motion for Rehearing. Filed May 13, 1913. A. E.
Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy
Clerk. [77]

[Title of Court and Cause.]

Judgment.

This cause was heard before the Honorable CHARLES F. CLEMONS, one of the Judges of the United States District Court for the Territory of Hawaii, without the intervention of a jury, a jury having been waived by stipulation in writing signed by plaintiff and defendants; and the Court, having heard the evidence and argument of counsel, finds the issues joined in favor of the plaintiff, and that the defendants, James F. Findlay, T. Clive Davies and W. H. Baird, are and each of them is justly indebted to plaintiff, The United States of America, principal and interest to the present date in the sum of Eight Thousand Nine Hundred and Sixty-two and 30/00 Dollars.

IT IS THEREFORE ADJUDGED by the Court that the United States of America recover of James F. Findlay, T. Clive Davies and W. H. Baird the said sum of \$8,962.30, together with all the costs of this cause, for both of which execution will issue.

To which act of the Court in finding the issue in favor of the plaintiff, and rendering judgment

against the defendants, the said defendants and each of them except.

(Sgd.) CHAS. F. CLEMONS,
Judge.

Approved as to form.

(Sgd.) HOLMES, STANLEY & OLSON,
Attorneys for Defendants. [79]

[Endorsed]: No. 81. (Title of Court and Cause.)
Judgment. Entered in J. D. Book, #2, at folio 421.
Filed June 17, 1913. A. E. Murphy, Clerk. By
(Sgd.) F. L. Davis, Deputy Clerk. [80]

[Title of Court and Cause.]

Exception to Judgment.

Now come the defendants in the above-entitled cause, by their attorneys, Holmes, Stanley & Olson, and except to the decision filed herein on the 17th day of June, 1913, on the ground that it is contrary to the law and the evidence and the weight of the evidence.

Dated, Honolulu, June 23, 1913.

JAMES F. FINDLAY,
T. CLIVE DAVIES and
W. H. BAIRD,

Said Defendants.

By (Sgd.) HOLMES, STANLEY & OLSON,
Their Attorneys.

[Endorsed]: No. 81. (Title of Court and Cause.)
Exception to Judgment. Filed Jun. 23, 1913. A.
E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy
Clerk. [81]

[Title of Court and Cause.]

Petition for Writ of Error.

In Error from the United States Circuit Court of Appeals for the Ninth Circuit to the United States District Court for the Territory of Hawaii.

The petition of James F. Findlay, T. Clive Davies and W. H. Baird, the plaintiffs in error in the above-entitled cause, respectfully shows that in the record and proceedings in a certain cause lately pending in the District Court of the United States for the Territory of Hawaii, wherein the above-named James F. Findlay, T. Clive Davies and W. H. Baird were defendants and the United States of America was plaintiff, and in the rendition of the final judgment against your petitioners on the 17th day of June, 1913, manifest errors have happened to the great damage of your petitioner, which said errors are specifically set forth in the assignment of errors filed with this petition, to which reference is hereby made;

WHEREFORE your petitioners respectfully pray that a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to the District Court of the United States for the Territory of Hawaii, be allowed in the above-entitled cause, directing that a transcript of the record, proceedings and papers in said cause be sent to the said United [82] States *Circuit of Appeals*, duly authenticated, for the correction of the errors so com-

plained of, and that a citation issue; and your petitioners will ever pray.

(Sgd.) HENRY HOLMES,

(Sgd.) WILLIAM L. STANLEY,

(Sgd.) CLARENCE H. OLSON,

(Sgd.) INGRAM M. STAINBACK,

Attorneys for said James F. Findlay, T. Clive Davies, and W. H. Baird.

Order Allowing Writ of Error.

The foregoing petition is granted and the writ of error allowed as prayed for.

(Sgd.) CHAS. F. CLEMONS,

Judge of the District Court of the United States for the Territory of Hawaii.

[Endorsed]: No. 81. (Title of Court and Cause.)
Petition for Writ of Error. Filed Dec. 16, 1913. A.
E. Murphy, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk. [83]

[Title of Court and Cause.]

Assignment of Errors.

Error to the United States District Court in and for the Territory of Hawaii.

Come now James F. Findlay, T. Clive Davies and W. H. Baird, plaintiffs in error, by Holmes, Stanley and Olson, their attorneys, and say that in the record and proceedings of the District Court of the United States in and for the District and Territory of Hawaii in the above cause, and in the rendition of judgment therein, manifest error has intervened to the prejudice of said plaintiffs in error in the fol-

lowing, among other things, to wit:

I.

Said District Court of the United States in and for the District and Territory of Hawaii in the trial of said cause erred in admitting in evidence over the objection and exception of the plaintiffs in error Exhibit 7, the same being a letter dated Honolulu, April 22d, 1911, addressed to E. R. Stackable, and signed "Theo. H. Davies & Co., Ltd.," requesting the Collector of Customs to cable to the Secretary of Commerce and Labor, Washington, for permission to grant clearance to the "Orteric" upon a satisfactory bond being furnished for the payment of any penalties which may be imposed for the alleged violations of the [85] Passenger Act by that steamer.

II.

Said Court erred in admitting in evidence over the objection and exception of the plaintiffs in error Exhibit 8, the same being a letter dated April 22d, 1911, addressed to E. R. Stackable, Collector of Customs, Honolulu, and signed by "Theo. H. Davies & Co., Ltd.," making application for clearance of the S. S. "Orteric" and offering to furnish a bond covering the alleged violations of the Passenger Act provided the facts concerning such alleged violations be submitted to the Secretary of Commerce and Labor for determination.

III.

Said Court erred in admitting in evidence over the objection and exception of the plaintiffs in error a letter dated Honolulu, June 17th, 1911, and ad-

dressed to the Secretary of Commerce and Labor, Bureau of Navigation, Washington, D. C., and signed by "E. R. Stackable, Collector," which said letter refers to a cablegram of April 22d, 1911, addressed to the Secretary by the Collector, and transmits a copy of the correspondence between Captain Findlay, the Customs Office and the United States District Attorney relative to the alleged violations of the Passenger Act of 1882, and enumerates penalties incurred under Sections 2, 3, 4, 5, 6 and 9 of said Act amounting to \$7,960.00 and suggests that the fine be mitigated to \$2,000.00, which said letter was admitted in evidence as Plaintiff's Exhibit 9.

IV.

Said Court erred in admitting in evidence a letter dated Honolulu, April 18th, 1911, addressed to R. W. Breckons, United States District Attorney, and signed by "E. R. Stackable, [86] Collector of Customs," enclosing a copy of the report of the Deputy Collector and Inspectors who measured and examined the "Orteric," and stating that, as appears from the report, 1,552 emigrants were taken on board the "Orteric"; that there were 14 births and 58 deaths during the voyage. The letter further stated the collector's opinion of the Passenger Act as amended was that wherever the term "Penalty" was used the amount should be collected by the Custom's Official, and that where the violation was construed as a misdemeanor, it should be reported to the United States District Attorney for prosecution. Said letter further enumerated the violation of the Act and the punishments incurred thereby. The

said report enclosed in the letter discussed the violations and apparent violations of the following sections of the Passenger Act, to wit: Section 1, relating to "Accommodation"; Section 2, relating to "Berths" and the separation of passengers; Section 3, relating to "Light and Ventilation"; Section 4, relating to the "Food, preparation of, etc."; Section 5, relating to "Hospitals"; Section 6, relating to "Discipline and Cleanliness"; and Section 7, relating to "Notices" required to be posted at the beginning of the voyage. The letter and enclosed report were admitted in evidence over the objection and exception of the plaintiffs in error, said letter and enclosure being marked Plaintiff's Exhibit 10.

V.

Said Court erred in admitting in evidence over the objection and exception of the plaintiffs in error Exhibit 11, which said exhibit consisted of two letters, one dated Honolulu, April 18th, 1911, addressed to E. R. Stackable, Collector of Customs, and signed "W. R. Frear, [87] Governor," containing a copy of a letter of A. de Sousa Canavarro, the said copy containing a discussion of the 58 deaths among the children on board the "Orteric," the lack of sanitary precaution on board the vessel stating, *inter alia*, that the lower decks of the vessel were never washed and that the mattresses were never aired, and concluding by asking whether civil and criminal proceedings should not be begun against the captain or officers for negligence.

VI.

Said Court erred in admitting in evidence over the

objection and exception of the plaintiffs in error a letter dated April 26th, 1911, addressed to R. W. Breckons, United States District Attorney, and signed by "E. R. Stackable, Collector of Customs," and suggesting that the report of the Grand Jury should be laid before the Secretary of Commerce and Labor, said letter being admitted in evidence as Plaintiff's Exhibit 12.

VII.

Said Court erred in admitting in evidence over the objection and exception of the plaintiffs in error an extract from the Opinion of the Grand Jury which was admitted in evidence as Plaintiff's Exhibit 13, which extract from the report of the Grand Jury states that it, the Grand Jury, was requested by the Collector of Customs and the United States District Attorney to make a report relative to conditions on board the "Orteric" in order that the proper Department at Washington, in inflicting the fines and penalties, if any are to be inflicted, should have the benefit of the Grand Jury's investigation. The [88] report discusses the alleged violation of the section of the Passenger Act relating to the segregation of the sexes; it also stated that the law relative to ventilation was not complied with; that the hospitals were unfit for the purposes for which they were provided; that the provisions of the Act relating to cleanliness were violated in a manner which cannot be too strongly condemned and goes into details of the filthy condition of the vessel and lack of sanitary arrangements *and*. The extract from the report of the Grand Jury concludes that on the

whole, with the evidence before it, the Grand Jury would probably have returned indictments had it not been for the action of the owners in submitting the facts to the Department of Commerce and Labor for its determination.

VIII.

Said Court erred in admitting in evidence over the objection and exception of the plaintiffs in error a letter dated Honolulu, May 15th, 1911, addressed to E. R. Stackable, Collector of Customs, and signed by "R. W. Breckons, United States District Attorney," enclosing a copy of the report of the Grand Jury relative to the "Orteric" matter and stating that the writer of the letter knew that the copy was a correct one, which letter was admitted in evidence and marked Plaintiff's Exhibit 15.

IX.

Said Court erred in admitting in evidence over the objection and exception of the plaintiffs in error three letters addressed to E. R. Stackable, Collector of Customs, and signed by "Holmes, Stanley and Olson," The first of said letters, dated June 8th, 1911, requested time within which to present certain evidence regarding the charges [89] against Captain Findlay, Master of the S. S. "Orteric." The second letter, dated June 13th, 1911, submitted for presentation to the Department of Commerce and Labor the following:

1. Affidavit of Captain Findlay, master of the "Orteric."
2. Confirmatory affidavits of Arthur Atkins, chief

officer of the "Orteric," and John Hopkins Pugh, ship's Doctor on the "Orteric."

3. Affidavit of John Hopkins Pugh.

4. Affidavit of Edith Hyde, one of the nurses on the "Orteric."

5. Copies of Notice in the English, Portuguese and Spanish languages, which were posted according to the above-mentioned affidavit.

Said letters and above-mentioned affidavits and copies of notice were admitted in evidence as Plaintiff's Exhibit 18.

A third letter, dated April 27th, 1911, marked Plaintiff's Exhibit 5, contained a protest against the imposition of penalties for alleged violation of the Passenger Act of 1882, as amended.

X.

Said Court erred in admitting in evidence over the objection and exception of the plaintiffs in error exhibit 9, the same being a letter to the Secretary of Commerce and Labor dated June 17th, 1911, and signed by "E. R. Stackable, Collector of Customs," and containing Plaintiff's Exhibits 10, 11, 12, 13, 14, 15, 16, 17, and 18, relating to the "Orteric" matter.
[90]

XI.

Said Court erred in admitting in evidence over the objection and exception of the plaintiffs in error a letter dated, Washington, D. C., April 22d, 1911, addressed to the Department of Commerce and Labor and signed by "Baker, Sheedy and Hogan," requesting that the Department of Commerce and Labor instruct the Collector at Honolulu to report in detail

the causes of the detention of the “Orteric,” and to permit her to proceed on her voyage when the master entered into a bond to make good any penalty found to be due by the vessel or the master. Said letter was admitted in evidence as Plaintiff’s Exhibit 20.

XII.

Said Court in its decision of January 20th, 1913, finding the facts in the case, in finding that there was a submission to the Secretary of Commerce and Labor for the purpose of obtaining remission of penalties incurred, or alleged to have been incurred by the S. S. “Orteric” or its master.

XIII.

Said Court erred in its decision of January 20th, 1913, finding the facts in the case, in finding that the master of the S. S. “Orteric” led the Government Officers to understand that it was his intention to make a submission to the Secretary of Commerce and Labor for remission of penalties incurred or alleged to have been incurred by the S. S. “Orteric” or its master.

XIV.

That said Court erred in finding that the S. S. “Orteric” and its master were estopped to deny that there was a submission to the Secretary of Commerce and Labor for [91] remission of penalties incurred or alleged to have been incurred.

XV.

Said Court erred in holding that it was within the power of the Secretary of Commerce and Labor to remit the alleged penalties.

XVI.

Said Court erred in its decision of January 20th, 1913, finding the facts in the case, in finding that there was an admission by the master of the "Orteric" of the alleged violations of the law.

XVII.

Said Court erred in its decision, finding the facts in the case, in finding that the master applied for the remission of admitted penalties.

XVIII.

Said Court erred in finding that the bond of the defendants was not a contract to submit the question of liability of the master and vessel to the determination of the Secretary of Commerce and Labor.

XIX.

Said Court erred in its decision of January 20th, 1913, finding the facts in the case, in finding that the plaintiff was entitled to judgment against the defendants.

XXI.

Said Court erred in overruling the motion in arrest of judgment filed February 5th, 1913.

XXII.

Said Court erred in holding that the Complaint in the above cause stated a cause of action. [92]

XXIII.

Said Court erred in rendering judgment against the plaintiffs in error upon June 17th, 1913.

XXIV.

Said Court erred in adjudging that the defendant in error recover against the plaintiffs in error the

amount prayed in its Complaint or any amount whatever.

XXV.

Said Court erred in not dismissing the Complaint of the defendant in error.

XXVI.

Said Court erred in its decision finding the facts made on the 20th day of January, 1913, in finding that the bond sued upon the Complaint of the defendant in error, was ambiguous.

XXVII.

Said Court erred in rendering judgment against T. Clive Davies and W. H. Baird, plaintiffs in error, the sureties upon said bond.

WHEREFORE said plaintiffs in error pray that the judgment made and entered in said cause on the 17th day of June, 1913, be reversed, set aside and held for naught, and judgment ordered and directed in favor of the plaintiffs in error.

Dated, Honolulu, T. H., December 16th, 1913.

(Sgd.) HENRY HOLMES,

(Sgd.) WILLIAM L. STANLEY,

(Sgd.) CLARENCE H. OLSON,

(Sgd.) INGRAM M. STAINBACK,

Attorneys for Plaintiffs in Error.

Service of the foregoing Assignment of Errors this 16 day of December, 1913, is hereby admitted.

(Sgd.) JEFF McCARN,

U. S. District Attorney, Hawaii. [93]

[Endorsed]: No. 81. (Title of Court and Cause.)
Assignment of Errors. Filed Dec. 16, 1913. A. E.

Murphy, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk. [94]

[Title of Court and Cause.]

Bill of Exceptions.

BE IT REMEMBERED that on the 22d day of April, A. D. 1912, at a stated term of the above court, begun and held in Honolulu, in the City and County of Honolulu, in and for the District and Territory of Hawaii, before the Honorable Charles F. Clemons, District Judge for the Territory of Hawaii, the issues joined in the above stated cause between the said parties came on to be heard before the Court sitting without a jury, a trial by jury being specially waived by written stipulation, the United States being represented by Robert W. Breckons and C. H. Olson of the firm of Holmes, Stanley & Olson, appearing for defendant, the following proceedings being had, the plaintiff to sustain the issues on its part introduced the following evidence:

1. A bond dated the 22d day of April, 1911, payable to the United States of America, and signed by James F. Findlay as principal, and T. Clive Davies and W. H. Baird as sureties, the same being admitted in evidence and marked [95] exhibit 1, and being the same bond mentioned and set forth in the plaintiff's bill of complaint;

2. A cable, dated Honolulu, April 22, 1911, addressed to the Secretary of Commerce and Labor, Washington, and signed "Customs," the same being admitted in evidence and marked exhibit 2, a copy of

which marked exhibit 2, is hereto attached and made a part hereof;

3. A cable, dated Washington, April 22, 1911, addressed to "Customs," Honolulu, and signed "Cable, Acting Secretary," the same being admitted in evidence and marked exhibit 3, a copy of which marked exhibit 3 is hereto attached and made a part hereof;

4. A letter, dated Honolulu, April 17, 1911, addressed to Captain James Findlay, Master, "Orteric," Honolulu, and signed by E. R. Stackable, Collector, the same being admitted in evidence and marked exhibit 4, a copy of which marked exhibit 4 is hereto attached and made a part hereof;

5. A letter, dated Honolulu, April 27, 1911, addressed to E. R. Stackable, Collector of Customs, and signed by Holmes, Stanley & Olson, the same being admitted in evidence and marked exhibit 5, a copy of which marked exhibit 5 is hereto attached and made a part hereof;

6. A letter, dated Washington, December 4, 1911, addressed to the Collector of Customs, Honolulu, Hawaii, signed "Benjamin F. Cable, Acting Secretary," the same being admitted in evidence and marked exhibit 6, a copy of which marked exhibit 6 is hereto attached and made a part hereof;

That thereupon, plaintiff rested its case.

That defendants herein introduced no evidence, but rested their case, and the case was taken under advisement by [96] the Court.

That thereafter and on the 5th day of September, A. D. 1912, the plaintiff, by its attorney Robert W. Breckons, moved that it be allowed to reopen its case

and introduce further evidence, which motion was granted against the exception of the defendants who were represented at the hearing of said motion by I. M. Stainback, of the firm of Holmes, Stanley & Olson, attorneys for the defendants.

Exception No. 1.

That thereafter on the 23d day of September, A. D. 1912, the case came on for further hearing, R. W. Breckons representing the plaintiff, and I. M. Stainback appearing on behalf of the defendants; that thereupon the plaintiff offered in evidence a letter dated Honolulu, April 22, 1911, addressed to E. R. Stackable and signed "Theo. H. Davies & Co., Ltd.," being a letter admitted in evidence and marked exhibit 7, a copy of which marked exhibit 7 is hereto attached and made a part hereof, to the offer of which objection was made, as follows (Transcript, pages 1 and 2):

"Mr. BRECKONS.—If the Court please, I desire to offer further testimony * * * *

"The COURT.—Yes.

"Mr. BRECKONS.—Letter of April 22d, 1911, addressed to E. R. Stackable, Collector of Customs; purported to be signed by Theo. H. Davies & Company. I'll ask counsel to admit that the letter was signed by Davies & Company, and the signature here is Mr. Baird's, one of the defendants, and that Davies & Company are agents for the 'Orteric.'

"Mr. STAINBACK.—We admit all except the last. We admit the letter was signed and the signature.

“The COURT.—You do not admit the fact of agency.

“Mr. STAINBACK.—We’ll admit that they’re agents as far as they’ve signed in that respect. I object to the admission of this letter. It is incompetent, irrelevant and immaterial. It is an attempt to vary a written [97] instrument by parole. It is otherwise not binding upon the defendant.

“The COURT.—The objection will be overruled and the exception noted.”

to which ruling the defendants duly excepted and the exception was allowed.

Exception No. 2.

THAT THEREUPON the plaintiff offered in evidence a letter dated April 22, 1911, addressed to E. R. Stackable, Collector of Customs, Honolulu, and signed by Theo. H. Davies & Company, Limited, said letter being an application for clearance of the S. S. “Orteric,” and offering to furnish a bond covering the alleged violations of the Passenger Act, provided the facts concerning such alleged violation be submitted to the Secretary of Commerce and Labor for determination, which letter was admitted in evidence as Plaintiff’s Exhibit 8, a copy of which marked exhibit 8 is hereto attached and made a part hereof, to the offer of which objection was made by the defendants as follows (Transcript of Evidence, p. 2):

“Mr. BRECKONS.—Offer a letter written at the same day to E. R. Stackable, Collector of Customs, signed by W. H. Baird.

“Mr. STAINBACK.—We’ll admit the sig-

nature of the letter. We further object to this letter, not only irrelevant and immaterial and not binding upon the defendants and an attempt to vary by parole a written instrument, but further that it was not received until after the date of the bond.

“The COURT.—The letter will be admitted and the objection overruled.”

to which ruling an exception was duly noted and allowed.

Exception No. 3.

THAT THEREUPON the plaintiff offered in evidence a letter dated Honolulu, June 17, 1911, and addressed to the Secretary of Commerce and Labor, Bureau of Navigation, [98] Washington, D. C., and signed by E. R. Stackable, Collector, which said letter refers to the cablegram of April 22, 1911, addressed to the Secretary by the Collector, and transmits a copy of the correspondence between Captain Findlay, the Customs Office and the United States Attorney, relative to the violation of the Passenger Act of 1882, and enumerates penalties incurred under sections 2, 3, 4, 5, 6, and 9 of said Act, amounting to \$7,960.00, and suggests that the fine be mitigated to \$2,000.00, which said letter was admitted in evidence as Plaintiff's Exhibit 9, a copy of which marked exhibit 9 is hereto attached and made a part hereof, to the offer of which an objection was made by the defendant as follows (Transcript of Evidence, p. 5):

“Mr. BRECKONS.—I offer in evidence a letter addressed to the Secretary of Commerce and

Labor, Bureau of Navigation, Washington, D. C., dated June 17, 1911, and ask counsel to admit for the purpose of making the offer that such a letter was sent signed by Mr. Stackable.

“Mr. STAINBACK.—We admit that. We object that it is immaterial, irrelevant and incompetent. Further, that it is after the date of the bond, and an attempt to vary a written instrument or to substitute a new contract.

“The COURT.—Objection overruled.”

to which ruling, an exception by the defendant was duly noted and allowed.

Exception No. 4.

THAT THEREUPON the plaintiff offered in evidence a letter from the Collector of Customs, Honolulu, to R. W. Breckons, United States District Attorney, containing a copy of the report of the Inspectors who measured and examined the “Orteric,” which said letter and enclosed report were admitted in evidence as Plaintiff’s Exhibit 10, copies of which marked exhibit 10 are hereto attached [99] and made a part hereof, to which offer objection was made by the defendants as follows (Transcript of Evidence, pages 5 and 6) :

“Mr. BRECKONS.—Mr. Stackable, I call your attention to Exhibit No. 9. I see one set of enclosures there. Can you tell me what those enclosures were?

“A. I don’t know that I can give them all off-hand or not. There was a letter that I wrote to Captain Findlay, there was a letter of the inspectors.

“Q. I’ll put them in one at a time. Was the letter which I now show you and which was exhibit 4 one of the enclosures?

“A. Yes, sir.

“Q. Was the letter or a copy of the letter which I show you, being letter addressed to myself, dated April 18, 1911, numbered 6,129, one of the enclosures?

“A. I am pretty sure it was. That’s the one that I called your attention to the fact that it might be a subject the Grand Jury would like to consider.

“Q. Are you not sure that it was? Didn’t you have your letter book this morning and you run over it?

“A. Yes, sir.

“Was the report of the inspector, which is attached to this letter to me, in your enclosure?

“A. Yes, sir.

“Mr. BRECKONS.—I offer those as part of the enclosures.

“Mr. STAINBACK.—I understand the enclosure was put in your letter to Washington.

“A. Not put; they go in a bunch and fastened them together.

“Mr. STAINBACK.—I object to this letter as immaterial, incompetent, not binding on the defendants in this case.

“The COURT.—The objection is overruled. The letters are admitted in evidence and the exception is noted.”

to which ruling, defendants duly excepted and the exception was allowed. [100]

Exception No. 5.

THAT THEREUPON the plaintiff offered in evidence two letters, which were admitted in evidence as Plaintiff's Exhibit 11, copies of which marked exhibit 11 are hereto attached and made a part hereof, one of which letters was addressed to his Excellency, Walter F. Frear, Governor of Hawaii, and signed by A. de Souza Canavarro, the Portuguese Consul, the other addressed to E. R. Stackable and signed by Governor Frear. The letter of Mr. Canavarro discusses the fifty-eight deaths among the children on board the "Orteric," and the lack of sanitary precautions on board the vessel, stating, *inter alia*, that the lower decks were never washed and the mattresses never aired, and concludes by asking whether civil and criminal proceedings should not be begun against the captain or officers for negligence. The letter from Governor Frear, dated April 18, 1911, enclosed the letter from A. de Souza Canavarro. To the offer of which said letters, objection was made as follows (Transcript of Evidence, pages 6 and 7):

"Mr. BRECKONS.—(Addressing E. R. Stackable, who was testifying after being duly sworn.) I show you two letters, one addressed to His Excellency, Walter F. Frear, Governor of Hawaii, and signed by Mr. Canavarro, the Portuguese Consul, and the letter addressed to you, signed by Governor Frear, and ask you whether or not they were enclosed.

"A. Yes, sir.

“Mr. BRECKONS.—They are offered as part of the enclosures. (Referring to the enclosure in Mr. Stackable’s letter to the Secretary of Commerce and Labor.)

“Mr. STAINBACK.—All of this is in the line of hearsay. I can see that it is material or relevant to this case, a letter expressing an opinion of a third person with reference to the condition of the ship. I don’t see that [101] it is binding on the defendants and object on that ground.

“The COURT.—The objection is overruled. The letter of Governor Frear, with Mr. Canavaro’s letter attached, are received in evidence, and the exception is noted as before. Of course, in receiving that, I am not saying that any facts in there, that that’s any evidence of what the conditions were, for it is hearsay; but it is merely evidence of what was submitted by the Collector to the Secretary.”

to which ruling the defendants duly excepted, which exception was noted and allowed.

Exception No. 6.

THAT the plaintiff offered in evidence the following letter admitted in evidence as Plaintiff’s Exhibit 12, a copy of which marked exhibit 12 is hereto attached and made a part hereof, which letter was dated April 26, 1911, addressed to R. W. Breckons, United States District Attorney, and signed by E. R. Stackable, Collector of Customs, said letter suggesting that the report of the Grand Jury should be laid before the Secretary of Commerce and Labor to

which offer objection was made as follows (Transcript of Evidence, page 7):

“Mr. BRECKONS.—I show counsel a letter purporting to have been written by Mr. Stackable to myself on April 26, and ask him to waive any question about the letter having been signed.

“Mr. STAINBACK.—We admit that.

“Mr. BRECKONS.—(Addressing the witness, Mr. Stackable, who had been duly sworn and was testifying.) I show you this letter, No. 6167, addressed to myself, and ask you whether or not that was one of the enclosures in your letter to the Secretary. A. Yes, sir.

“Mr. BRECKONS.—I offer it in evidence.

“Mr. STAINBACK.—Same objection. [102]

“The COURT.—Objection overruled.”

to which ruling exception by the defendants was duly noted and allowed.

Exception No. 7.

THAT THEREUPON the plaintiff offered in evidence an extract from the opinion of the Grand Jury which was admitted in evidence as Plaintiff's Exhibit 13, a copy of which marked exhibit 13 is hereto attached and made a part hereof, which extract states that the Grand Jury was requested by the Collector of Customs and the United States District Attorney to make a report relative to conditions on board the “Orteric” in order that the proper department at Washington, in inflicting the fines and penalties, if any are to be inflicted, should have the benefit of the Grand Jury's investigation. The report

discusses the alleged violation of the Passenger Act, and concludes that on the whole, with the evidence before it, the Grand Jury would probably have returned indictments had it not been for the action of the owners in submitting the facts to the Department of Commerce and Labor for its determination. To this offer, objection was made as follows (Transcript of Evidence, pages 7 and 9):

“Mr. BRECKONS.—I find reference in that, Mr. Stackable, to the part of the Grand Jury report dealing with this subject. I will ask you whether or not you forwarded to the Department as part of this letter part of the Grand Jury report dealing with the question.

“A. Yes, sir.

“Mr. BRECKONS.—We’ll ask counsel to admit that so much of this copy of the Grand Jury report as deals with the subject of the “Orteric” was forwarded by Mr. Stackable to Washington.

“Mr. STAINBACK.—It is admitted, in order to save time, that all in the list Mr. Stackable has, was forwarded [103] to Washington, but we object to the admissibility and materiality.

“The COURT.—Objection is overruled and exception noted.”

to which ruling an exception was duly noted by the defendants and allowed.

Exception No. 8.

THAT the plaintiff offered in evidence a letter dated Honolulu, May 15, 1911, addressed to E. R.

Stackable, Collector of Customs, and signed by R. W. Breckons, United States District Attorney, transmitting a copy of the report of the Grand Jury relative to the "Orteric" matter and stating that he personally knew that the copy was a correct one, which letter was admitted in evidence and marked Plaintiff's Exhibit 15, a copy of which marked exhibit 15 is hereto attached and made a part hereof, to which offer the defendants objected, which said objection was overruled, to which ruling an exception by the defendant was duly noted and allowed.

Exception No. 9.

THAT the plaintiff offered in evidence a letter dated June 8, 1911, addressed to E. R. Stackable, Collector of Customs, and signed by Holmes, Stanley & Olson, requesting time within which to present certain evidence regarding the charges against Captain Findlay, Master of the Steamship "Orteric." Another letter dated June 13, 1911, addressed to E. R. Stackable, Collector of Customs, Honolulu, signed by Holmes, Stanley & Olson, and submitting for presentation to the Department of Commerce and Labor, the following:

1. Affidavit of Captain James Findlay, master of the S. S. "Orteric" (which was admitted in evidence as Plaintiff's Exhibit 18, a copy of which marked exhibit 18 is hereto attached and made a part hereof); [104]
2. Confirmatory Affidavits of Arthur Atkins, chief officer of the "Orteric," and John Hopkins Pugh, ship's doctor of the "Orteric";
3. Affidavit of John Hopkins Pugh;

4. Affidavit of Edith Hyde, one of the nurses on the "Orteric";

5. Copies of notice in the English, Portuguese and Spanish languages, which were posted according to the above-mentioned affidavits.

Said above-mentioned affidavits and copies of notices above mentioned were admitted in evidence as Plaintiff's Exhibit 18, copies of which marked exhibit 18 are hereto attached and made a part hereof.

A third letter dated April 27, 1911, addressed to E. R. Stackable, Collector of Customs, signed Holmes, Stanley & Olson, which letter was admitted as Plaintiff's Exhibit 5, a copy of which marked exhibit 5 is hereto attached and made a part hereof, said letter containing a protest against the imposition of penalties for alleged violation of the Passenger Act of 1882. To the offer of plaintiff to introduce the above-mentioned letters and enclosures, objection was made by the defendants as follows (Transcript of Evidence, pages 12-14):

"Question by Mr. Breckons, addressed to Mr. Stackable, a witness for the plaintiff, who had been duly sworn and was testifying.

"Q. Now your next enclosure?

"A. The next enclosure was a Grand Jury report and then there were three letters from Holmes, Stanley & Olson. I have a sufficient memorandum for them.

"Q. You say you enclosed three letters?

"A. They are on file. They came back from Washington.

“Q. What I am trying to get at, what was in your letter? Can you tell us which one of the Holmes, Stanley & Olson letters it was? You have no memorandum?

“A. I think that they were. I think there were three letters of Holmes, Stanley & Olson, but I cannot identify them. [105]

“Q. Was this one of them, being exhibit 5?

“A. Yes, that’s one.

“Q. I show you a letter of April 22d bearing on it the marks,—I beg your pardon, June 8th, 1911, from Holmes, Stanley & Olson to you. Is that one of them?

“A. Yes, that’s one of them.

“Mr. BRECKONS.—I’ll ask counsel to admit that Holmes, Stanley & Olson wrote such a letter.

“Mr. STAINBACK.—Yes, we wrote that letter.

“Q. And the letter of Holmes, Stanley & Olson to you of June 13, 1911, was that one of the enclosures?

“A. Yes, sir.

“Q. In the letter of June 13th I find a reference to certain enclosures sent to Holmes, Stanley & Olson, five in number. The first, an affidavit of Captain James F. Findlay. I show you an affidavit of Captain James F. Findlay and ask you if that was it and whether that was forwarded. That was Captain Findlay’s affidavit referred to in the Holmes, Stanley & Ol-

son letter which was forwarded to Washington.

“A. Yes.

“Q. The second enclosure referred to are affidavits of Arthur Atkins and John Hopkins Pugh. I show you affidavits purporting to have been by Arthur Atkins and John Hopkins Pugh. Were they a part of Holmes, Stanley & Olson’s enclosures?

“A. Yes, sir.

“Q. Now, a third reference to an affidavit purporting to have been made by John Hopkins Pugh, was that a part of Holmes, Stanley & Olson’s enclosures?

“A. Yes, sir.

“Q. Affidavit of Edith Hyde. I show you an affidavit purported to have been made by Edith Hyde and ask you was that a part of Holmes, Stanley & Olson’s enclosures.

“A. Yes, sir.

“Q. And I show you copies, what purport to be copies of notice required by section 7 of the Passenger Act of 1882, as amended, and call your attention to a document headed ‘U. S. Navigation Laws, American Ships’ and ask you whether that is the enclosure referred to in Holmes, Stanley & Olson’s letter and forwarded by you to Washington. [106]

“A. Yes, sir.

“Mr. BRECKONS.—No. 15 offered in evidence.

“The COURT.—The objection is a blanket one and the exception is taken.”

to which offer the defendant objected, the objection was overruled, to which ruling an exception by the defendants was duly noted and allowed.

Exception No. 10.

THAT THEREUPON Plaintiff's Exhibit 9, being a letter to the Secretary of Commerce and Labor, signed by E. R. Stackable, Collector of Customs, and containing exhibits 10, 11, 12, 13, 14, 15, 16, 17, 18, was placed in evidence against the objection and exception of the defendants objection being made as follows (Transcript of Evidence, page 14):

“Mr. STAINBACK.—I object to the whole line of letters as immaterial, irrelevant and incompetent and an attempt to vary a written instrument, and further that they merely represent the opinion of the writers not in any way binding on the defendants.”

“The COURT.—The objection is noted and overruled.”

to which ruling, an exception by the defendants was duly taken and allowed.

Exception No. 11.

THAT the plaintiff then offered in evidence a letter dated Washington, D. C., April 22, 1911, addressed to the Department of Commerce and Labor, and signed by Baker, Sheehy & Hogan, said letter being admitted in evidence as Plaintiff's Exhibit 20, a copy of which marked exhibit 20 is hereto attached and made a part hereof, which said letter requested that the Department of Commerce and La-

bor instruct the Collector at Honolulu to report in detail the causes of the [107] detention of the "Orteric" and to permit the "Orteric" to proceed on her voyage when the master entered into a bond to make good any penalty found to be due by the vessel or the master. To this offer the defendants objected and the objection was overruled, to which ruling an exception was duly made by the defendants and allowed.

Exception No. 12.

THAT THEREUPON the Court continued the case for further disposition. That thereafter on January 20, 1913, the Court rendered its decision, a copy of which, marked exhibit "A," is hereto attached and made a part hereof, in favor of the United States, to which decision counsel for the defendant excepted on the ground that the decision was contrary to the law and the evidence and the weight of the evidence.

Exception No. 13.

THAT THEREAFTER, and before the entry of judgment, counsel for the defendant, upon February 5, 1913, filed a motion in arrest of judgment on the ground that the Complaint in said cause failed to state a cause of action. That thereafter, on May 13, 1913, the Court overruled the motion in arrest of judgment, to which ruling an exception was duly made by the defendant and allowed.

THAT THEREUPON counsel for defendants filed a motion for a rehearing, which motion was taken under advisement by the Court until June 17, 1913, at which time said motion was denied.

Exception No. 14.

THAT THEREAFTER, on June 17, 1913, the Court ordered the decree and judgment to be entered against the defendants, to which judgment defendants duly excepted on the ground [108] that the judgment was contrary to the law and the evidence and the weight of the evidence, and the exception was allowed.

The foregoing Bill of Exceptions is based on the record and proceedings herein, the transcript of the stenographer's notes, together with all pleadings, exhibits, clerk's notes and documents on file, which are expressly made a part of this Bill of Exceptions and incorporated herein as fully as if they and each of them were actually set out herein in words and figures, and the defendants pray that all such pleadings, records, exhibits, clerk's notes, transcript of the testimony and all documents on file relating to said cause, be, by order of the Court, incorporated herein as fully as if they and each of them were actually set out herein in words and figures.

[Order Allowing Bill of Exceptions.]

The undersigned Judge having departed from the Territory of Hawaii immediately after the rendition of the judgment in the cause, and having remained absent therefrom until after the expiration of the term, and having stated at the time of the rendition of the judgment that there would be ample time after his return for the perfection of an appeal from said judgment, the foregoing Bill of Exceptions being found to be conformable to the truth and to be a true and correct record of the proceedings and

constituting a true and correct Bill of Exceptions, the same is hereby allowed this 16th day of December, 1913, as of the April Term, 1913.

(Sgd.) CHAS. F. CLEMONS,

Judge Presiding at the Trial of said Cause.

Rec't of copy hereof, prior to presentation, admitted on Dec. 13, A. D. 1913.

(Sgd.) ROBT. W. BRECKONS,

U. S. Atty. [109]

[Title of Court and Cause.]

Writ of Error [Original].

In Error from the United States Circuit Court of Appeals for the Ninth Circuit to the District Court of the United States for the Territory of Hawaii.

The United States of America,—ss.

The President of the United States of America to the Honorable the Judge of the District Court of the United States for the Territory of Hawaii, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said District Court before you, between the United States of America, as plaintiff, and James F. Findlay, T. Clive Davies and W. H. Baird, as defendants, manifest error hath happened to the great damage of the said James F. Findlay, T. Clive Davies and W. H. Baird, as by its complaint appears; we being willing that error, if any hath been, shall be duly corrected, and full and speedy justice

done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the [189] same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same in the said Circuit Court of Appeals in the City of San Francisco, in the State of California, within 30 days from the date hereof, to wit, on the 15th day of January, 1914, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, the 16th day of December, in the year of our Lord one thousand nine hundred and thirteen and of the Independence of the United States the one hundred and thirty-seventh.

[Seal]

A. E. MURPHY,

Clerk of the District Court of the United States for the Territory of Hawaii.

The foregoing writ of error is hereby allowed this 16th day of December, 1913.

CHAS. F. CLEMONS,

Judge of the District Court of the United States for the Territory of Hawaii.

[Endorsed]: No. 81. (Title of Court and Cause.)
Writ of Error. Filed Dec. 16, 1913. A. E. Murphy,

Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk.
[190]

[Title of Court and Cause.]

Citation [Original].

In Error from the United States Circuit Court of Appeals for the Ninth Circuit to the United States District Court for the Territory of Hawaii.

The United States of America,—ss.

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, State of California, within thirty days from the date hereof, to wit, on the 15th day of January, 1914, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Territory of Hawaii, wherein James F. Findlay, T. Clive Davies and W. H. Baird are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 16th day of December, 1913, and of the Independence of the United States the

one hundred and thirty-seventh year.

[Seal]

CHAS. F. CLEMONS,

Judge of the District Court of the United States for
the Territory of Hawaii. [191]

Admission of Service of Citation.

Service of the foregoing citation, and receipt of a
copy thereof, is hereby admitted this 16th day of
December, 1913.

JEFF McCARN,

United States District Attorney for the Territory of
Hawaii.

[Endorsed]: No. 81. (Title of Court and Cause.)
Citation. Filed Dec. 16, 1914. A. E. Murphy,
Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk.
[192]

[Title of Court and Cause.]

Bond.

KNOW ALL MEN BY THESE PRESENTS,
that we, R. Klamp and George Rodiek, both of the
City and County of Honolulu, Territory of Hawaii,
are held and firmly bound unto the United States of
America in the penal sum of Ten Thousand Dollars
(\$10,000), lawful money of the United States, for
the payment of which, well and truly to be made we
bind ourselves, our successors, heirs, executors and
administrators, jointly, severally and firmly, by these
presents:

The condition of the above obligation is such that,
whereas, in that certain case entitled United States
of America, Plaintiff, vs. James F. Findlay, T. Clive

Davies and W. H. Baird, Defendants, filed in the U. S. District Court for the Territory of Hawaii, the United States of America did on the 17th day of June, A. D. 1913, in the said District Court recover a judgment against the said James F. Findlay, T. Clive Davies and W. H. Baird, for the sum of Eight Thousand Nine Hundred Sixty-two and Thirty-one Hundredths Dollars (\$8,962.30), from which said judgment [193] the said James F. Findlay, T. Clive Davies, and W. H. Baird are about to sue out a writ of error from the said District Court to the United States Circuit Court of Appeals for the Ninth Circuit, and whereas said James F. Findlay, T. Clive Davies and W. H. Baird desire pending decision on said writ of error to stay execution on said judgment of the said District Court:

NOW, THEREFORE, if the said James F. Findlay, T. Clive Davies and W. H. Baird shall duly prosecute their said writ of error with effect and moreover pay the amount of the said judgment in said original cause, together with interest and costs that may be awarded against them in case of their failure to sustain the said writ of error, then the above obligation to be void; otherwise to remain in full force and effect.

IN WITNESS WHEREOF we have hereunto set our hands and seals this 12th day of July, A. D. 1913.

(Sgd.) R. KLAMP.

(Sgd.) GEORGE RODIEK.

Approved as to sureties.

(Sgd.) C. C. BITTING,

Asst. U. S. Attorney.

[Endorsed]: No. 81. (Title of Court and Cause.)
Bond. Filed Jul. 12, 1913. A. E. Murphy, Clerk.
By (Sgd.) Wm. L. Rosa, Deputy Clerk. [194]

[Title of Court and Cause.]

Before the Honorable CHAS F. CLEMONS, Judge
of Said Court.

APPEARANCES:

For Plaintiff, R. W. BRECKONS, Esq., United
States District Attorney.

For Defendants, I. M. STAINBACK, Esq., of
the Firm of HOLMES, STANLEY &
OLSON.

Transcript of Testimony.

Sept. 23, 1912.

Mr. BRECKONS.—If the Court please, I desire
to offer certain further testimony. It is possible
that I may duplicate some of it. I would suggest
now, in these matters,—it is merely a suggestion,—
that your Honor reserve a ruling on the objection to
the admissibility.

The COURT.—Yes.

Mr. BRECKONS.—Letter of April 22, 1911, ad-
dressed to E. R. Stackable, Collector of Customs;
purported to be signed by Theo. H. Davies & Co.
I'll ask counsel to admit that the letter was signed
by Davies & Co. and the signature here is Mr.
Baird's, one of the defendants, and that Davies &
Co. are agents for the "Orteric." [195]

Mr. STAINBACK.—We admit all except the last.

We admit that the letter was signed and the signature.

The COURT.—You do not admit the fact of agency.

Mr. STAINBACK.—We'll admit that they're agents as far as they've signed in that respect. I object to the admission of this letter. It is incompetent, irrelevant, and immaterial; it is an attempt to vary a written instrument by parole; it is otherwise not binding upon the defendants.

The COURT.—The objection will be overruled and the exception noted.

Mr. STAINBACK.—Exception noted.

(Letter received in evidence and marked Plaintiff's Exhibit 7.)

Mr. BRECKONS.—Offer a letter written at the same day, to E. R. Stackable, Collector of Customs, signed by W. H. Baird.

Mr. STAINBACK.—We'll admit the signature of the letter. We further object to this letter, not only irrelevant and immaterial and not binding upon the defendants and an attempt to vary by parole a written instrument, but, further, that it was not received until after the date of the bond.

The COURT.—The letter will be admitted and the objection overruled.

(Letter received in evidence and marked Plaintiff's Exhibit 8.)

Mr. BRECKONS.—I'll ask counsel to make the other admission that Mr. Baird is the president of Davies & Co.

Mr. STAINBACK.—Yes.

[Testimony of E. R. Stackable, for Plaintiff.]

Direct examination of E. R. STACKABLE, a witness called on behalf of plaintiff, and sworn.

Mr. BRECKONS.—Q. Can you tell by looking at the letter I hand you, being Exhibit No. 2, when it was received? [196]

A. It was received on the 22d day of April, 1911.

Q. And when with reference to the time the bond was delivered to you? Before or after?

A. I think this one was after. There were two letters on that date.

Q. I'll show you the other one.

A. And one of them, my recollection is, was asking me to cable for authority to clear that ship and they're both dated the same day, and I believe I received them the same day, but my recollection is that this letter was received subsequent to this.

Q. That is, referring to No. 2 as being received subsequent to No. 1?

A. Yes, sir. As a matter of fact, I have an idea I was in Mr. Breckons' office when I received that second letter.

Mr. STAINBACK.—How is it—don't you stamp the date that they're received? Don't you have a stamp, "Collector of Customs Office"? You stamp the date of the receipt of the letters?

A. Yes, sir.

Q. Do you remember what day this letter was received on? A. Yes, sir.

Q. What day of the week was it, this second letter, No. 2, was received?

(Testimony of E. R. Stackable.)

A. I don't know that has any bearing on it. I have the matter in mind, it seems to me it was Saturday, but to get up and swear now that the 22d of April was Saturday—

Q. Why was this stamped the 24th underneath? Can you explain that?

A. Yes, I can, very readily. My recollection is that that letter was delivered to me in Mr. Breckons' office and after office hours and that I turned my stamp on Monday morning, and stamped other letters, and after stamping it 24, I had to put 22 knowing that I got it on that date. This was delivered after the bond was given.

Q. This was after office hours, is that correct? [197] I understand you to say that you thought this was delivered after the bond was given. They first wrote. If your're reading the first letter, we're talking about the second letter. I understood you to say a while ago that you thought it was delivered after the bond? A. Yes.

Q. That's to the best of your recollection?

A. Not after the bond was delivered.

Q. I understood you to say a while ago that this one was delivered before the bond and this second one after the bond was given. That's what I understood you to say.

A. I don't think that I said that. I didn't mean to say—

Q. As a matter of fact, do you know when it was delivered? Before or after the bond was given?

A. My recollection of this business has been fully

(Testimony of E. R. Stackable.)

explained and gone over with the Judge here. As I said before, this letter was the basis on which I cabled to Washington for authority.

Q. That's No. 1?

A. To clear that ship under their proposed proposition of a bond. Then, when we got the clerk dispatched on that cable, I received the same day, and, I think that I was in Mr. Breckons' office, in the afternoon, when that bond was written by the attorneys and submitted up there, at the time they proposed the form of a bond, they brought this application. That's my recollection, though I have to tax a man's memory just when he gets a letter on a subject of that kind.

Q. As long as the date was changed I thought probably for that reason you would remember how the letter was received and the facts because you have had some one day and many another.

A. If you're accustomed to stamping letters you'll know that sometimes your stamp doesn't make it clear to you.

The COURT.—These exhibits were offered this afternoon, 1 and 2, but some others have previously been put in evidence. I'll ask the clerk to number them. [198]

The CLERK.—7 and 8.

The COURT.—Will the record show that what was referred to by the witness as No. 1 is No. 7, and 2, No. 8.

Mr. BRECKONS.—I offer in evidence 6130, addressed to Capt. J. F. Findlay, master of the British

(Testimony of E. R. Stackable.)

S. S. "Orteric." Ask counsel to admit that that letter was sent, signed by Mr. Stackable, sent to and received by, Captain Findlay.

Mr. STAINBACK.—I understand that this letter is already in.

Mr. BRECKONS.—Yes, I beg your pardon. I offer in evidence a letter addressed to the Secretary of Commerce and Labor, Bureau of Navigation, Washington, D. C., dated June 17, 1911, and ask counsel to admit for the purpose of making the offer that such a letter was sent, signed by Mr. Stackable.

Mr. STAINBACK.—We admit that. We object that it's immaterial, irrelevant, and incompetent; further, that it is after the date of the bond, and an attempt to vary a written instrument or to substitute a new contract.

The COURT.—Objection overruled.

Mr. STAINBACK.—Exception.

The COURT.—Exception noted.

(Letter received in evidence and marked Plaintiff's Exhibit 9.)

Mr. BRECKONS.—Q. Mr. Stackable, I call your attention to exhibit No. 9. I see one set of enclosures there. Can you tell what those enclosures were?

A. I didn't get all that question.

Q. I say, it says "1 set of enclosures" at the end.

A. "1 set of enclosures," yes, sir.

Q. Can you tell me what those enclosures were? Do you know what those enclosures were?

A. I don't know that I can give them all offhand or not. There was a letter that I wrote to Captain

(Testimony of E. R. Stackable.)

Findlay; there was a letter of the inspectors.

Q. I'll put them in one at a time. Was the letter which I now show you, and which is exhibit 4, one of the enclosures? [199] A. Yes, sir.

Q. Was the letter, or a copy of the letter which I show you, being letter addressed to myself, dated April 18, 1911, numbered 6129, one of the enclosures?

A. I am pretty sure it was. That's the one that I called your attention to the fact that it might be a subject the Grand Jury would like to consider.

Q. Are you not sure that it was? Didn't you have your letter-book this morning and you run over it?

A. Yes, sir.

Q. Was the report of the inspectors which is attached to this letter to me in your enclosures?

A. Yes, sir.

Mr. BRECKONS.—I offer those as part of the enclosures.

Mr. STAINBACK.—I understand the enclosure was put in your letter to Washington?

A. Not put; they go in a bunch and fastened them together.

Mr. STAINBACK.—I object to this letter as immaterial, incompetent, not binding on the defendants in this case.

The COURT.—The objection is overruled; the letters are admitted in evidence and the exception is noted.

(Letter received in evidence and marked Plaintiff's Exhibit #10.)

The COURT.—Exhibit No. 10, being a letter from

(Testimony of E. R. Stackable.)

to Collector to Mr. Breckons with the inspectors' report attached.

Mr. BRECKONS.—I show you two letters, one addressed to His Excellency Walter F. Frear, Governor of Hawaii, and signed by Mr. Canavarro, the Portuguese Consul, and the letter addressed to you signed by Governor Frear, and ask you whether or not they were enclosed?

A. Yes, sir.

Mr. BRECKONS.—They are offered as part of the enclosures.

Mr. STAINBACK.—All of this is in the line of hearsay. I can't see that it's material or relevant to this case, a letter expressing an opinion of a third person with reference to the condition [200] of the ship. I don't see that it's binding on the defendants and object on that ground.

The COURT.—The objection is overruled. The letter of Governor Frear with Mr. Canavarro's letter attached are received in evidence and the exception is noted as before. Of course, in receiving that I'm not saying that any facts in there, that that's any evidence of what the conditions were, for it is hearsay; but it is merely evidence of what was submitted by the Collector to the Secretary.

(Letter received in evidence and marked Plaintiff's Exhibit No. 11.)

Mr. BRECKONS.—I show you a letter purporting to have been written by—I show counsel a letter purporting to have been written by Mr. Stackable to myself on April 26th, and ask him to waive any question about the letter having been signed.

(Testimony of E. R. Stackable.)

Mr. STAINBACK.—We admit that.

Mr. BRECKONS.—I show you this letter, No. 6167, addressed to myself, and ask you whether or not that was one of the enclosures in your letter, in your letter to the Secretary.

A. Yes, sir.

Mr. BRECKONS.—I offer it in evidence.

Mr. STAINBACK.—Same objection.

The COURT.—Objection overruled.

Mr. STAINBACK.—Exception.

The COURT.—Exception noted.

(Letter received in evidence and marked Plaintiff's Exhibit #12.)

Mr. BRECKONS.—Q. I find reference in that, Mr. Stackable, to the part of the Grand Jury Report dealing with this subject. I will ask you whether or not you forwarded to the Department as part of this letter, part of the grand jury report dealing with the question. A. Yes, sir.

Q. I take it you cannot tell what was in the Grand Jury report. You could not identify the part that was sent by you? [201]

A. I have a recollection of some of the statements made in it, but to be able to call them verbatim, I couldn't do that now.

Q. All right, I'll cover that later. Mr. Stackable, you this morning, without knowing that you have been in contempt of Court, made some marks on one of the exhibits in this case, the cablegram from Washington reading, "With approval United States Attorney, clear Orteric, 15,000 bond." You have

(Testimony of E. R. Stackable.)

“ERS,” April 23, 1911. Just tell us why you did that, or how it came about.

A. You called my attention this morning to the date we got here, June 23, and asked me if it wasn't a mistake and I said that I'd get the original and I'd take it out and see. It was a mistake of the party copying it in the office. I didn't realize, your Honor, that that was filed.

Q. I'll ask you then to amend that, Mr. Stackable. This copy of the cablegram, being Exhibit No. 3, when was it received by you?

A. On the 22d of April, 1911. I couldn't tell when. I saw the figures here this morning. I couldn't tell who put them there, but, of course, we can always get a certified copy. I can bring the original if it is necessary.

Q. You're sure it was received on the 22d?

A. I'm sure it was the 22d.

Q. Exhibit 1, 3, and 2, being the two cablegrams, was that forwarded as copies forwarded in your report to the Secretary?

A. I recollect that this, I confirmed this cablegram by a letter saying, “I hereby confirm my cablegram of even date—

The COURT.—The question was, were copies of this sent with the correspondence to the Treasurer or Secretary of Commerce and Labor; that is, in this bunch of enclosures, were there included copies of these cables? A. Why, yes, we sent.

Q. The question originally was, were these cables

(Testimony of E. R. Stackable.)

or copies thereof, made a part of the enclosures?
[202]

A. I think they were. It would be most difficult for a man to tell absolutely. I can get my record up here and be certain of it. I think I confirmed that first cablegram by letter.

Mr. BRECKONS.—I show, you Mr. Stackable, a letter already admitted in evidence, exhibit 5, and ask you whether or not a copy of that was forwarded to the Department.

A. I think it was.

Q. How long will it take you to get your book up here? A. I believe that copy was made.

The COURT.—I can say that copy of the letter was.

(Recess.)

Mr. BRECKONS.—I'll ask counsel to admit that the firm of Baker, Sheney & Hogan were, July, 1911, April, 1911, July, 1911, and June, 1911, the attorneys resident in Washington for the "Orteric" and the owners of the "Orteric."

Mr. STAINBACK.—We can't admit it, your Honor; that is the first we've heard of it.

Mr. BRECKONS.—We'll ask counsel to admit that so much of this copy of the Grand Jury report as deals with the subject of the "Orteric" was forwarded by Mr. Stackable to Washington.

Mr. STAINBACK.—It is admitted, in order to save time, that all in the list Mr. Stackable has, was forwarded to Washington, but we object to the admissibility and materiality.

(Testimony of E. R. Stackable.)

The COURT.—Objection is overruled and exception noted.

(Report received in evidence and marked Plaintiff's Exhibit 13.)

Mr. BRECKONS.—I'll ask counsel to admit that this letter, Mr. Findlay, the master, addressed to Mr. Stackable, dated April 21, 1911, was sent to Mr. Stackable and this is a copy of the answer which Mr. Stackable sent to Findlay.

Mr. STAINBACK.—This is another letter which has a change of dates, I notice. I suppose it's correct and the dates are all right. I admit the letter, but I don't admit that it is material.

The COURT.—Is that made a part of the letter of June 17? [203]

Mr. BRECKONS.—Yes. I'll wait.

The COURT.—I'll admit that.

Mr. STAINBACK.—We object to that as immaterial and irrelevant.

The COURT.—I will receive that in evidence and note the exception.

Mr. STAINBACK.—Of course, we object to this whole line of testimony that it is an attempt to break down by parol evidence, vary the terms of a written instrument.

(Letter received in evidence and marked Plaintiff's Exhibit 14.)

Mr. BRECKONS.—What were the enclosures? What was the first enclosure?

A. The first one is my letter to Captain Findlay dated April 17, No. 6130.

(Testimony of E. R. Stackable.)

Q. That is, I show you Exhibit 4. Now, is that the first one you refer to, this letter?

A. That's it.

Q. Now, your next? A. Letter to you, No. 6129.

Q. This is Exhibit 10? A. Yes.

Q. All right. The answer to that should be a copy of the letter of the inspectors; that is the one attached to Exhibit 10 already? A. Yes.

Q. All right.

A. The next is a letter from the captain of the ship and signed by Davies & Co., dated April the 21st, making application to go outside for anchor.

Q. That's exhibit 14. What is the next one?

A. My letter to them, dated April the 21st.

Q. That is, exhibit No. 14, being the letter and the answer? A. Yes, sir.

Q. All right. Now, your next?

A. That was a cable.

Q. Which cable? A. The first cable. [204]

Q. I show you exhibit 2; is that an enclosure?

A. A copy of that.

Q. And exhibit No. —. What is your next?

A. Letter of April 22.

Q. What is that?

A. Requesting me to send this cable.

Q. The one you have just referred to now, exhibit No. 7, was the next enclosure? A. Yes.

Q. No. 8. Or, what is your next one?

A. The next one was another one from Davies & Co.

Q. Is this— A. That's it.

(Testimony of E. R. Stackable.)

Q. That's No. 8. All right. Now, the next?

A. Next, the bond.

Q. Which is in evidence in the case, exhibit 1.

A. The next is a copy of my letter.

Q. Now, what was that?

A. April 24, confirming this cablegram.

Q. I show you right there a letter being your No. 6511, 6911, addressed to E. R. Stackable. No. 9911, addressed to the Secretary of Commerce and Labor, April 24, 1911, and ask you whether that was one of the enclosures? A. Yes, sir.

Mr. BRECKONS.—That is offered in evidence.

Mr. STAINBACK.—I wish to object to the total number of enclosures.

Mr. BRECKONS.—Now, your next one?

A. The next one is a copy of the cablegram of April the 22d. Evidently that's a copy of that.

Q. The cablegram was received on the 22d? Is that exhibit No. 3? A. Yes, sir.

Q. Now, your next one?

A. Next is a letter from Governor Frear, April 18. The one you have already put in evidence. [205]

Q. Exhibit 11? A. Yes.

Q. Now, what's the next?

A. The next is a letter to you.

Q. What date?

A. April 26, asking for a copy of the Grand Jury Report.

Q. Is that your letter 6167?

A. 6167, exhibit 12.

Q. Now, the next one?

(Testimony of E. R. Stackable.)

A. Is a letter of December the 16th.

Q. Addressed to whom?

A. Your letter addressed to me sending the Grand Jury Report.

Mr. STAINBACK.—Was that enclosed in your letter to the secretary?

A. A copy of the Grand Jury Report.

Q. And the letter from Holmes, Stanley & Olson?

A. These letters came back. I think three letters went from Holmes, Stanley & Olson. You've got duplicates, I think, on your file now. They came from my office.

Q. The enclosure to which you have just now referred is a letter from myself to you, is it not, simply enclosing the copy of the Grand Jury Report requested by you? A. Yes.

Q. Now, your next enclosure?

A. The next enclosure was a grand jury report and then there were three letters from Holmes, Stanley & Olson. I have a sufficient memorandum of them.

Q. You have already covered the Grand Jury Report.

A. The letters of Holmes, Stanley & Olson, are, in complete state, on file in this office.

Q. Have you anything here showing what those three letters were?

A. I have no memorandum of them. I have a pretty good recollection of what those letters were.

Q. You say you enclosed three letters? [206]

(Testimony of E. R. Stackable.)

A. They're on file. They came back from Washington.

Q. What I'm trying to get at, what was in your letter? Can you tell us which one of the Holmes, Stanley & Olson letters it was? You have no memorandum?

A. I think that they were, I think there were three letters of Holmes, Stanley & Olson, but I cannot identify them.

Q. Was this one of them, being exhibit 5?

A. Yes, that's one.

Q. I show you a letter of April 22, bearing on it the marks, I beg your pardon. June 8, 1911, from Holmes, Stanley & Olson to you. Is that one of them? A. Yes, that's one of them.

Mr. BRECKONS.—I'll ask counsel to admit that Holmes, Stanley & Olson wrote such a letter.

Mr. STAINBACK.—Yes, we wrote that letter.

(Letter received in evidence and marked Plaintiff's Exhibit 16.)

Q. And the letter of Holmes, Stanley & Olson to you of June 13, 1911. Was that one of the enclosures? A. Yes, sir.

Q. In the letter of June 13, I find a reference to certain enclosures sent by Holmes, Stanley & Olson, five in number. The first, an affidavit of Capt. Jas. F. Findlay. I show you an affidavit of Capt. Jas. Findlay and ask you if that was it and whether that was forwarded. That was Capt. Findlay's affidavit referred to in the Holmes, Stanley & Olson letter which was forwarded to Washington. A. Yes.

(Testimony of E. R. Stackable.)

Q. The second enclosures referred to are affidavits of Arthur Atkins and John Hopkins Pugh. I show you affidavits purporting to have been by Arthur Atkins and John Hopkins Pugh. Were they a part of Holmes, Stanley & Olson's enclosures?

A. Yes, sir.

Q. Now, a third reference to an affidavit purporting to be made by John Hopkins Pugh. Was that a part of Holmes, Stanley [207] & Olson's enclosures?

A. Yes, sir.

Q. Affidavit of Edith Hyde. I show you an affidavit purported to have been made by Edith Hyde and ask you was that a part of Holmes, Stanley & Olson's enclosures?

A. Yes, sir.

Q. And I show you copies, what purported to be copies of notice required by Section 7 of the Passenger Act of 1882 as amended and call your attention to a document headed, "U. S. Navigation Laws, American Ships," and ask you whether that is the enclosure referred to in Holmes, Stanley & Olson's letter and forwarded by you to Washington.

A. Yes, sir.

Mr. BRECKONS.—No. 15. Offered in evidence.

The COURT.—The objection is a blanket one and the exception is taken.

Mr. STAINBACK.—I object to the whole line of letters as immaterial, irrelevant, and incompetent, and an attempt to vary a written instrument; and further, that they merely represent the opinion of the writers; not in any way binding on the defendants.

The COURT.—The objection is noted and overruled.

Mr. STAINBACK.—Exception is taken.

The COURT.—Exception allowed.

[Certificate of Reporter to Transcript of Testimony.]

I hereby certify that the foregoing is a full, true, and correct transcript of my shorthand notes in the above-entitled cause.

O. SOARES,
Official Reporter.

Honolulu, T. H., October 25, 1913. [208]

[Endorsed]: No. 81. (Title of Court and Cause.)
Transcript of Testimony. Filed October 25th, 1913.
A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [209]

[U. S. Exhibit No. 1—Bond.]

WHEREAS the Collector of Customs of the port of Honolulu, Territory of Hawaii, has given notice of J. F. Findlay, Master of the British Steamship “Orteric” that the said Master has incurred certain penalties on account of alleged violations of “The Passenger Act, 1882” as amended; and

WHEREAS the said Collector has been authorized by the Department of Commerce and Labor of the United States to grant immediate clearance to said Steamship upon a bond being furnished in the penal sum of Fifteen Thousand Dollars (\$15,000), approved by the United States District Attorney for the Territory of Hawaii, to insure the payment of such penalties for such violations aforesaid as shall

be determined by the Department of Commerce and Labor of the United States to have been incurred by the said Master after the presentation, within a reasonable time, by the said Master, or his agents or attorneys, and the officials of the United States at said Honolulu, of the facts, to said Department; and

WHEREAS a bond in the form of these presents and with the sureties therein named, has been approved by said United States District Attorney;

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS: That the said J. F. FINDLAY, as principal, and T. CLIVE DAVIES and W. H. BAIRD, both of said Honolulu, as sureties, are held and firmly bound unto THE UNITED STATES OF AMERICA in the penal sum of FIFTEEN THOUSAND DOLLARS (\$15,000), for the payment of which well and truly to be made, the said principal and sureties do bind themselves, their heirs, executors and administrators firmly by these presents:

THE CONDITION of the within and foregoing obligation is [210] such that if the said principal J. F. Findlay shall pay to the United States of America through the Collector of Customs at the port of Honolulu in the Territory of Hawaii the amount which the Department of Commerce and Labor of the United States shall, upon such presentation of facts, determine that the said principal is liable for on account of such penalties so alleged to have been incurred, then this obligation shall be null and void, otherwise of full force and effect.

IN WITNESS WHEREOF the said principal

and sureties have hereunto set their hands and seals this 22d day of April, 1911.

(Sgd.) JAMES F. FINDLAY. (Seal)

(Sgd.) T. CLIVE DAVIES (Seal)

(Sgd.) W. H. BAIRD. (Seal)

In presence of,

(Sgd.) WM. BUCHANAN.

(Sgd.) G. H. WHITNEY.

The foregoing bond is hereby approved as to form and sureties.

Dated, April 22, 1911.

(Sgd.) ROBT. W. BRECKONS,
United States District Attorney for the Territory of
Hawaii.

[Endorsed]: No. 81. (Title of Court and Cause.)
U. S. Exhibit #1. Filed Apr. 22, 1912. A. E.
Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy
Clerk. [211]

**[U. S. Exhibit No. 2—Cablegram, April 22, 1911,
Customs to Secretary Commerce Labor.]**

Honolulu, April 22, 1911.

Send the following cablegram "VIA COMMERCIAL PACIFIC" subject to the terms and conditions printed on the back hereof which are agreed to.

SECRETARY COMMERCE LABOR—WASHINGTON.

Agents British steamer ORTERIC make application clear under bond covering alleged penalties amounting approximately ten thousand dollars pas-

senger act 1882. Recommend favorable consideration.

CUSTOMS.

Commercial Rate.

[Endorsed]: No. 81. (Title of Court and Cause.)
U. S. Exhibit #2. Filed Apr. 22, 1912. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk.
[212]

**[U. S. Exhibit No. 3—Cablegram, April 22, 1911,
Cable, Acting Secretary to Customs.]**

TIME 11:38 A.M. April 22, 1911.

SF. "USG" WASHINGTON, DC., 16.

CUSTOMS,

HONOLULU.

With Approval United States Attorney Clear
Orteric Fifteen Thousand Dollar Bond.

CABLE ACTING SECRETARY.

[Endorsed]: No. 81. (Title of Court and Cause.)
U. S. Exhibit #3. Filed Apr. 22, 1912. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk.
[213]

**[U. S. Exhibit No. 4—Letter, April 17, 1911,
Collector to Findlay.]**

No. 6130.

LED.

Honolulu, Hawaii, April 17, 1911.

Capt. J. F. Findlay,

Master of Br. S. S. "Orteric,"

Honolulu, Hawaii.

Sir:

I am constrained to notify you that you are liable

to penalties for alleged violations of the Passenger Act of 1882, as amended by the Act of February 14, 1903, the Act of February 9, 1905, and the Act of December 19, 1908, as follows:

Section 2. **BERTHS:** This section provides that single male passengers shall be berthed in the fore part of the vessel, in a compartment divided off from the space or spaces appropriated to the other passengers by a substantial bulkhead. While the proviso seems to have been complied with, it seems that the single men could not get to their compartment without going through the compartment occupied by other passengers. The law imposes a fine of \$5 for each passenger carried or brought, for a violation of this section.

Section 3. **LIGHT AND VENTILATION:** From what I am able to learn, when daylight did not furnish sufficient light, electric lights were provided. Ventilation, however, seems to have been inadequate throughout each and every compartment in which steerage passengers were carried or brought. The caboose and cooking [214] arrangements No. 6130 2.

while well appointed were insufficient in capacity to properly prepare the food for the number of passengers carried on board. The latrines or closets seem to have been sufficient in number but not properly located, all having been placed upon the upper deck and no closets or toilet accommodations having been provided upon either of the decks on which the emigrant passengers were berthed. The penalty for violation of this section is \$250.

Section 4. **FOOD:** From the slight opportunity we have had to communicate with the passengers, it would seem as though there was sufficient food provided for adult passengers, but serious complaints have been received relative to furnishing mothers with infants and young children with the necessary quantity of wholesome milk or condensed milk for the sustenance of the children. From the reports of your doctor, it would seem that the milk was served but twice a day, which is clearly not the necessary quantity for the proper nourishment of infants and children and undoubtedly had something to do with the high rate of mortality during the voyage. A violation of this section is a misdemeanor and is punishable by a fine of \$500.

Section 5. **PHYSICIANS AND HOSPITALS:** While there seems to be a sufficient amount of hospital space the ventilation thereof seems to be wholly inadequate. The law imposes a penalty of not exceeding \$250 for a violation of this section.

Section 6. **DISCIPLINE AND CLEANLINESS:** No notice seems to have been posted in any of the compartments in which the emigrant passengers were berthed requesting them to observe proper sanitary conditions, and from the filthy condition of the ship upon arrival [215] at this port, it would
No. 6130 3.

seem as though the officers in charge paid very slight attention to the requirements of this section. From reports received from my inspectors it would seem as though the decks or compartments in which the steerage passengers had been berthed had not been

washed or scrubbed out from the time you left Lisbon on or about February 16, 1911, until after your arrival at this port, April 13, 1911. Section 6 states in part that whenever the state of the weather will permit such passengers and their bedding shall be mustered on deck. From reports received, it would seem that the bedding has not been aired during the entire voyage. No arrangement seems to have been provided so that the emigrants could take a bath. Penalty for violation of this section is \$250.

Section 7. **SHIP'S COMPANY CANNOT VISIT STEERAGE QUARTERS:** No evidence is found that this section was posted as required by law, either written or printed in the language or the principal language of the passengers on board. A violation of this section is a misdemeanor and is punishable by a fine of \$100.

Section 9. **PASSENGER MANIFESTS, ETC.:** The manifest filed by you does not seem to be complete. It does not state the compartment or space occupied by the passengers during the voyage. The penalty for violation of this section is a fine not to exceed \$1,000.

Your attention is respectfully invited to Section 13 of the Act, relative to the collection of these penalties.

Prior to instituting proceedings for the enforcement of this penalty you will be given an opportunity to present any statements you may desire to make. I would suggest that whatever statements

you may desire to make, be made in the form of an affidavit. [216]

No. 6130 4.

Respectfully,

E. R. STACKABLE,

Collector.

[Endorsed]: No. 81. (Title of Court and Cause.)
U. S. Exhibit #4. Filed Apr. 22, 1912. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk.
[217]

[U. S. Exhibit No. 5—Letter, April 27, 1911, Holmes,
Stanley & Olson to Collector.]

HOLMES, STANLEY & OLSON.

ATTORNEYS-AT-LAW.

Honolulu, T. H., April 27, 1911.

E. R. Stackable, Esq.,

Collector of Customs for the Port of Honolulu,
Honolulu, T. H.

Dear Sir:

On the 17th day of April, 1911, Captain James Findlay, Master of the British Steamship "Orteric" was notified by letter from you under that date that he was liable to penalties for alleged violations of the Passenger Act of 1882, as amended, as follows:

Section 2. \$5.00 for each passenger carried or brought on the last trip of the "Orteric" to Honolulu.

Section 3. \$250.

Section 4. \$500.

Section 5. \$250.

Section 6. \$250.

Section 7. \$100.

Section 9. \$1000.

On the 22d day of April, 1911, in accordance with authority cabled to you by the Acting Secretary of Commerce and Labor of the United States, clearance was granted the said "Orteric" [218] upon the filing with you of a bond in the penal sum of \$15,000, conditioned upon the payment by Captain Findlay of such amount as might be determined by the Department of Commerce and Labor to be the amount of liability of said Captain Findlay on account of such penalties.

In order to preserve the rights of Captain Findlay in the premises, we now formally enter protest against the imposition of the penalties aforesaid and all penalties whatever that may be imposed on account of alleged violations of the Passenger Act of 1882, as amended, during or in the course of the said trip of the said "Orteric."

We also beg to state that we shall file with you as soon as possible a full statement of the facts concerning the said alleged violations, to be submitted to the Department of Commerce and Labor in order that it may arrive at a proper determination of the matter.

Yours respectfully,

(Sgd.) HOLMES, STANLEY & OLSON,

Attorneys for Captain James Findlay, Master of the
British Steamship "Orteric."

CHO/L.

[Endorsed]: No. 81. (Title of Court and Cause.)

U. S. Exhibit #5. Filed Apr. 22, 1912. A. E. Mur-

phy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk.
[219]

[U. S. Exhibit No. 6—Letter, December 4, 1911,
Cable to Collector.]

56983-N

COPY.

DEPARTMENT OF COMMERCE AND LABOR.

Office of the Secretary.

WASHINGTON.

December 4, 1911.

Collector of Customs,
Honolulu, Hawaii.

Sir: The Department has received your letter of the 9th ultimo, and previous correspondence, transmitting the application of James Findlay, master, for relief from the following penalties incurred in the case of the steamer ORTERIC for violation of the Passenger Act of August 2, 1882:

Section 2, \$5 for each statute passenger	
(1,242)	\$6,210
Section 3, penalty of	250
“ 5, “ “	250
“ 6, “ “	250
“ 9, “ “	1,000

Total.....\$7,960

SECTION 2: It is charged that the single men were placed in a compartment where it was necessary for them to go through the compartment occupied by families in order to reach their berths, during the latter part of the trip, at least, single men

were berthed with the families in some instances. After investigation by the grand jury it was found that during the latter part of the voyage no attempt was made to separate the sexes properly. This condition is explained by the master who states that about ten days after leaving Gibraltar there was a riot with Portuguese male passengers on one side and Spanish males on the other, resulting in a pitched battle with knives, clubs, cleavers, and pistols. He claims that previous to this trouble the male passengers not occupying berths with their wives were properly set off from the other passengers; after the riot the Portuguese males refused to be berthed with the Spanish males, being in fear of their lives, and to prevent bloodshed and to maintain discipline the Portuguese were moved aft.

SECTION 3: The grand jury found that the law relative to ventilation was not complied with and they could not find any evidence whatever that the ventilating apparatus provided had been properly [220] approved before the vessel cleared; the port holes in the various compartments did not admit air for proper ventilation; notwithstanding the fact that there was an electric light plant on board no fans were provided. The use of such fans would have ameliorated such conditions, and the lack of ventilation was held to have contributed to the large mortality on the vessel during her voyage. When severe weather necessitated the closing of the port holes and hatches the rate of mortality increased, the ventilating apparatus not supplying sufficient air. The master claims that on leaving Oporto, Portugal,

three days before leaving Gibraltar, ten Portuguese officers, among whom he believes were Portuguese immigrant officials, inspected the ship and approved her ventilation. He claims that there were two ventilators, each not less than 12 inches in diameter, one in the forward part of each compartment and one in the after part, and additional ventilators for each compartment in the proportion of 2 for each additional 50 passengers, all carried at least 6 feet above the uppermost part of the vessel. This statement does not appear to be in accord with the finding of the grand jury, which went on board the vessel and apparently had every opportunity to become acquainted with the facts. The latrines were sufficient in number but were located on the upper deck where they could be used only by passengers able or willing to climb there, necessarily resulting in a filthy condition below the upper deck. You report, however, that while the latrines were sufficient in number, in the temporary structures sanitary conditions had been neglected, water being used but twice a day for flushing with powdered disinfectants in the meantime. Under these conditions accumulations of human filth remained for hours at a time, much of it being in evidence at the time of your inspection.

SECTION 5: The grand jury found that the hospitals on board were not as required by law and wholly unfit for the purpose for which they were provided; that the ventilation in them was poor and the space allotted too small. In some of the hospital spaces it was found that even ordinary con-

veniences were not provided for the inmates. They stated that the apparent ignorance and lack of cleanliness on the part of the passengers constituted no excuse for failure to provide accommodations. The master states that there were two hospital compartments on the upper deck ventilated by large skylights and port holes and thoroughly lighted; on account of the number of passengers two additional compartments were utilized; these were located about amidships on the shelter deck and were fitted with three coaling ports communicating with the upper deck; when weather permitted these were kept open; they were each not less than 20 inches square; each compartment also had a door opening into the fidley which was at all times open through the upper deck; these doors were 6 feet by 2, always open; they were also fitted with other ventilators and ventilating devices. The master, however, does not describe them. Your report indicates that there was a sufficient amount of hospital space but the ventilation was wholly inadequate.

SECTION 6: No regulation in regard to discipline and cleanliness were kept posted during the voyage and the compartments and spaces provided for or occupied by the passengers were not kept in a clean and healthy condition. The grand jury found that no attempt had been made to muster the passengers on the upper deck or to air or clean their bedding; the mattresses and bedding during the entire voyage, save in a few rare instances, were not taken from the berths where they were first placed. On arrival at Honolulu it was necessary to burn all the

mattresses. The decks were not washed and the filth apparently was allowed to remain, being sprinkled over with sawdust and disinfectants. The result was an almost intolerable [221] stench which existed even up to the day when the vessel was examined by the grand jury. No conveniences were provided for the use of the children except such as were improvised after the beginning of the voyage and were wholly unfit, and the grand jury states that it is to be wondered at that no more deaths occurred than actually took place. You state that from the filthy condition of the ship on arrival it appears that the officers in charge paid very slight attention to the requirements of cleanliness; the decks or compartments where the passengers were berthed appeared not to have been washed or scrubbed from the time the vessel left Lisbon, February 16, to its arrival at your port, April 13. In one compartment a ship's room was found with gear stowed between it and the ship's side; this space served as a latrine; the accumulation of filth was covered by disinfectants; sawdust and disinfectants alternating with filth formed layers on the floor, resulting in a stench which was sickening; the berths were filthy; no baths could be taken except in the public wash room; no chambers were provided and empty meat cans were utilized by some of the passengers. The grand jury states that the provisions regarding cleanliness "were violated in a manner which cannot be too strongly condemned." The master states that he, the ship's doctor, and other officers almost every day, and one or more persons

every day, inspected the vessel and passengers and warned them to keep themselves in a cleanly condition and stay on the upper deck as much as possible; to air their baggage and bedding when weather would permit, but with few exceptions they refused, fearing their belongings would be stolen. Because of the large number of passengers it was impossible to air the bedding without their assistance; the crew was at all times engaged in cleaning the decks and compartments. Breakfast was served before entering your port and remnants were thrown about the floors and decks instead of overboard as had been the custom; the ship's crew was obliged to prepare the vessel for entry and these remnants remained on the floors. The passengers tore clother from the mattresses to make bags for carrying off their belongings and the contents of the mattresses were strewn together with the discarded rubbish. At the beginning of the voyage, regulations were posted but were torn down by the passengers. The ship's doctor states that he personally superintended the sanitary measures on board; that all compartments and decks were swept not less than twice daily and disinfected; that he would not permit the washing of compartments occupied by passengers because he believed that this would result in unavoidable dampness which would be detrimental; that all accumulations were rendered harmless and innocuous by disinfectants; that the sleeping compartments were scraped with shovels every day and swept; that the temporary hospital quarters were well suited for the purpose; that the mortality

on board was due largely to the concealment by parents of the ailments of their children and refusal to accept medical attention, and that there were the usual accommodations for washing by the passengers.

SECTION 9: The manifest filed by the master did not state the compartments or spaces occupied by passengers during the voyage. The master states that after the riot on board mentioned above, the shifting of the passengers in order to segregate the Spanish from the Portuguese resulted in some confusion, making it impossible for affiant to include in the list of passengers the exact compartments and spaces occupied by them thereafter.

From the papers submitted it is evident that this vessel with 1,242 passengers was navigated on a voyage of eight weeks under all conditions of weather in violation of practically all of the provisions of the Passenger Act having to do with the health, comfort, and [222] well-being of the passengers. The death of 57 children during the voyage marks this as the worst case ever submitted to the Department. The sexes were not properly segregated during a large portion of the voyage, the master stating that the confusion was such that it was impossible for him to state in the manifest the exact compartments and spaces occupied by the various passengers. The ventilation of the ship appears to have been wholly inadequate, this lack of ventilation in the opinion of the grand jury, increasing the rate of mortality. Ill-ventilated hospital facilities without adequate equipment were fur-

nished; the manifest of the vessel was not completed, and the sanitary conditions of the vessel were inexcusable. The Department concurs in the following extract from the report of the grand jury:

“We cannot emphasize too strongly the necessity for the observance of regulations requiring vessels to be kept in a clean and sanitary condition. When poor immigrants, perhaps unaccustomed to modern methods of sanitation, are brought into a tropical climate such as Hawaii, not only their own good, but the good of the community in general is subserved by a rigid insistence on compliance with the law.”

In the opinion of the Department, penalties aggregating \$7,960 were incurred in this case for violation of the sections enumerated and it declines to intervene in behalf of the offenders.

Respectfully,

BENJ. S. CABLE,
Acting Secretary.

EDF—COPY.

[Endorsed]: No. 81. (Title of Court and Cause.)
U. S. Exhibit #6 (Copy). [223]

[U. S. Exhibit No. 7—Letter, April 22, 1911, Davies
& Co. to Collector.]

Honolulu, T. H., April 22nd, 1911.

E. R. Stackable, Esq.,
Collector of Customs.

Sir: We respectfully request that you will cable to the Secretary of Commerce and Labor, Washing-

ton, for permission to grant clearance to the British steamer "Orteric" upon a satisfactory bond being furnished for the payment of any penalties which may be imposed in respect of the alleged violations of the Passenger Act by that steamer, and full particulars regarding the matter to be furnished to the Department of Commerce & Labor for their determination of what shall be done in connection therewith.

We are, Sir,

Your obedient servants,

THEO. H. DAVIES & CO., LTD.,

(Sgd.) W. H. BAIRD,

Treasurer,

Agents, S. S. "Orteric."

[Endorsed]: No. 81. (Title of Court and Cause.)
U. S. Exhibit #7. Filed Sep. 23, 1912. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk.
[224]

[U. S. Exhibit No. 8—Letter, April 22, 1914, Davies & Co. to Collector.]

Honolulu, T. H., April 22nd, 1914.

E. R. Stackable, Esq.,

Collector of Customs,

Honolulu, T. H.

Dear Sir: As agents of the British steamer "Orteric" now in the port of Honolulu, we make application for clearance of the said steamer for Victoria, British Columbia.

In view of the alleged violations of the Passenger

Act of 1882 aggregating penalties in the sum of about \$10,000, we will furnish to you an adequate bond in the sum of \$20,000, covering the same, providing that the facts concerning such alleged violations be submitted to the Secretary of Commerce and Labor for determination.

Yours respectfully,

THEO. H. DAVIES & CO., LTD.,

(Sgd.) W. H. BAIRD,

Treasurer.

[Endorsed]: No. 81. (Title of Court and Cause.)
U. S. Exhibit #8. Filed Sep. 23, 1912. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk.
[225]

[U. S. Exhibit No. 9—Letter, June 17, 1911,
Collector to Secretary of Commerce and Labor.]

No. 10106.

LED. Honolulu, Hawaii, June 17, 1911.

The Honorable,

The Secretary of Commerce and Labor,

Bureau of Navigation,

Washington, D. C.

SUBJECT: Br. S. S. "ORTERIC"—Fine Cast
No. 123.

Sir: Referring to my cablegram of April 22, 1911, which reads as follows: "SECRETARY COMMERCE LABOR—WASHINGTON. Agents British steamer ORTERIC make application clear under bond covering alleged penalties amounting approximately ten thousand dollars passenger act

1882. Recommend favorable consideration. CUSTOMS," and to Department cablegram of like date, which reads as follows: "CUSTOMS HONOLULU. With approval United States Attorney clear ORTERIC fifteen thousand dollar bond. CABLE Acting Secretary," I have the honor to transmit herewith a copy of the Correspondence between this office, Capt. J. F. Findlay, master of the Br. S. S. "Orteric," the U. S. Attorney, etc., relative to violation of the Passenger Act of 1882 by the above named vessel.

I beg to report as follows: We have ascertained through the assistance of the Immigration Service that there were 1,242 statute passengers carried on the Br. S. S. "Orteric."

Penalties:

Section 2.	\$5 fine for each statute passenger carried or brought—1,242 at \$5.	\$6,210
Section 3.	Penalty of.....	250
Section 4.	Misdemeanor reported to U. S. Attorney	
Section 5.	Penalty of.....	250
Section 6.	“ “	250
Section 7.	Misdemeanor reported to U. S. Attorney	
Section 9.	Penalty of.....	1,000
Total,		<hr/> \$7,960 <hr/>

This matter has been held in abeyance to await the pleasure of Messrs. Holmes, Stanley and Olson, attorneys for the master of the "Orteric," from April 22d to June 14, 1911.

I deem it proper to make the following suggestions, viz:

Section 2. That the fine be mitigated to....\$1,000

Section 3. That in view of the filthy condi-

Section 5. tion of the ship, the total

Section 6. amount of the fines imposed

under each section be collected 750

Section 9. That the fine be mitigated to.... 250

	Total,	\$2,000
		<hr/>
		<hr/>

Respectfully,

_____,
Collector.

Enclosures—1 set.

[Endorsed]: No. 81. (Title of Court and Cause.)
U. S. Exhibit #9. Filed Sep. 23, 1912. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk.
[227]

[U. S. Exhibit No. 10—Letter, April 18, 1911,
Collector to U. S. Attorney.]

No. 6129.

LED.

Honolulu, Hawaii, April 18, 1911.

Hon. R. W. Breckons,
U. S. District Attorney,
Honolulu, Hawaii.

Sir: I transmit herewith for your information and for such action as you may deem proper in the premises, a copy of the report of the Deputy Collector and Inspectors who measured and examined the Br. S. S. "Orteric" which vessel arrived at this port on the 13th instant with emigrants from Oporto, Lisbon, and Gibraltar.

From the report you will notice that 1,552 emigrants were taken on board this vessel; there were 14 births during the voyage which would make a total of 1,566. There were 58 deaths among the passengers, I believe all being children with the exception of one.

As I understand the provisions of the Passenger Act of 1882 as amended by the Act of February 14, 1903, the Act of February 9, 1906, and the Act of December 19, 1908, wherever the term "penalty" is used, this office should collect the amount of the penalty and where the violation of the section is construed to be a misdemeanor, it should be submitted to you for prosecution. As I interpret the violations, they are as follows:

Section 2, \$5 for each passenger carried or brought.

Section 3, fine of \$250.

Section 4, misdemeanor punishable by fine of not more than \$500.

Section 5, penalty not exceeding \$250.

Section 6, penalty not exceeding \$250.

Section 7, misdemeanor punishable by fine of not more than \$100.

Section 9, location of each passenger carried or brought, does not seem to be clearly stated in the passenger lists submitted to this office. [228]

In the matter of interviewing the emigrants to ascertain whether they were properly cared for during the voyage, I desire to state for your information that the emigrants are under quarantine by the Territorial Board of Health and it seems quite impossible for my deputies to interview them without violating the rules of said Board.

It seems to me that in view of the high rate of mortality on this ship and the filthy condition of the vessel, that it is a subject that might be worthy of the consideration of the Grand Jury.

I will submit to you at a later date a copy of my notice to the master of the vessel relative to fines under the various sections.

Respectfully,

Collector.

Enclosure—1. [229]

LED.

Honolulu, Hawaii, April 17, 1911.

The Collector of Customs,

Honolulu, Hawaii.

Sir: Having been assigned the duty of examining and inspecting the British steamer "Orteric," in re Passenger Act of 1882, we beg herewith to respectfully report our findings as follows:

The Br. S. S. "Orteric" cleared from Oporto, Portugal, on February 21, 1911, with 300 Portuguese emigrants. Leaving Oporto, she arrived at Lisbon on February 22, 1911, where 252 more were awaiting her arrival and then she proceeded to Gibraltar, Spain, arriving on February 24, 1911, where she took on 1,000 Spanish emigrants, completing her passenger list, all of which were destined for Honolulu. Departing from Gibraltar with a total of 1,552 souls aboard, she arrived at this port on the morning of the 13th day of April, 1911, with but 1,508 souls, 44 souls less than at the beginning of her voyage.

This apparent discrepancy is accounted for in the deplorable high death rate occurring during the voyage, there being 58 deaths among the emigrants. There were also 14 births, which added to the total number embarked at the three different ports, makes a total of 1,566 and deducting the number of deaths, 58 (one death occurring on the morning of arrival) will leave a total of 1,508 souls.

Judging from the general appearance of the children, one is inclined to believe that the reason for such high mortality among them was the lack of proper and sufficient nourishment, and we would

recommend a more thorough investigation along these lines under Section 4. [230]

Section 1. ACCOMMODATION: The Br. S. S. "Orteric" has two decks on which passengers were carried which, for the purpose of this report, we designate as the "first deck" above the lowest passenger deck, and the "second deck" above the lowest passenger deck, which conform to the requirements of the Passenger Act of 1882.

Section 2. BERTHS: An apparent violation of this section appears in the fact that single male passengers, while berthed by themselves according to law, were obliged to pass through the compartments assigned to married people in order to reach the upper deck. In one instance a few single men were berthed in the same compartment with families. While the berths conformed to the requirements of the law it was learned from the ship's doctor that the bedding, which consisted of mattresses and pillows filled with coarse straw, and of blankets, was neither changed nor aired during the entire voyage. From the Chief Steward, who accompanied our inspection, and from our own observations, we found abundant verification of these violations of the section.

Penalty—\$5.00 for each passenger carried or brought on the vessel.

Section 2. LIGHT AND VENTILATION: The ventilation was inadequate throughout the compartments occupied by steerage passengers. Fresh air, in the main, being introduced only through port and hatchways. In some instances wind sails were used

at times. The light was insufficient on the first deck above the lowest passenger deck. Hatchways and companionways were in a condition to be fully approved. The caboose, while well appointed, was deficient in capacity, even under more favorable supervision, for the requirements of the number of passengers carried, particularly as such a large number required special diet because of illness. The latrines seemed to have been sufficient in number, though in the [231] temporary structures sanitary conditions had been neglected, water being used but twice a day for flushing with powdered disinfectants in the meantime. Under these conditions accumulation of human filth remained for hours at a time, much of it being in evidence at the time of our inspection. The location of these structures on the open upper deck rendered their remoteness from the passenger compartments a serious hardship and resulted in the frequent commission of nuisance in the secluded corners of the sleeping quarters. In this connection it may be stated that no chambers were provided for the children, and few, if any, for the invalids, though such vessels were improvised from empty meat cans by some of the passengers.

Penalty for violation of the provisions of this section is not to exceed \$250.00.

Section 4. FOOD, PREPARATION OF, ETC.: Numerous complaints in respect to the proportions and quality of food furnished were noted among the passengers but, after a careful investigation into the merits of said complaints, and after the Chief Steward's submission of a daily issue sheet from

which comparisons were made with U. S. Navy rations, we feel justified in discrediting the alleged complaints as regards the quantity of daily issue to each passenger. From an inspection of such of the ship's stores as were exhibited, it was evident that the quality was good though perhaps not entirely conforming to the needs and habitual diet of the passengers carried. In proper hands, it would seem that much more might have been made of the food issued than the cooks were able to accomplish, especially in catering to the peculiar tastes of the passengers carried. The ship's doctor informed us that while probably a sufficient quantity of condensed milk was issued for use of infants, it was deficient in fats and hence was lacking in nutrition, a fact attested by [232] the imaciated condition of many of the children. It seems proper in this connection to state that milk was issued but twice daily, which is clearly not frequently enough for the proper nourishment of the infants many of whom became deprived of mother's milk en route.

Tables and seats were provided in all the compartments, though not generally used as food was served in the berths. With a single exception accommodations were insufficient to seat all the passengers in three sittings, as required in Department Circular of August 6, 1909.

Penalty for every wilfull violation of the provision of this section is \$500.00.

Section 5. HOSPITALS: The hospitals provided were ample in area and conformed substantially to the requirements of the law, with this ap-

parent exception: ventilation as elsewhere, was wholly inadequate. In most instances, being furnished only through the medium of a small 9" port. Owing to the extensive prevalence of measles (?), two whole compartments in the bunker section of the ship were converted into emergency hospitals. Their proximity to the engines and the scanty ventilation rendered them uncomfortable from the heat. Penalty for violation of this section \$250.00.

Section 6. DISCIPLINE AND CLEANLINESS: Too much emphasis cannot be placed on the foul condition in which all the passenger compartments abounded.

Acting under the direction of the ship's doctor no water was used for scrubbing the decks on which passengers were carried during the entire voyage. Sawdust and powdered disinfectants alternating with filth formed layers of varied thickness on the floors and the resulting stench was sickening.

The berths which were used both as beds and tables were, in many instances, reeking in filth. In one compartment a ship's boom was found with gear stowed between it and the ship's side. This space served as a latrine, to all intents and purposes, and was so [233] used by the occupants of that compartment under stress, and the consequent accumulations of filth throughout the voyage were but partly strangled by the disinfectants used.

No notice requiring passengers to observe proper sanitary rules were posted in any part of the vessel.

For neglect or violation of any of the provisions of this section, the penalty is \$250.00.

Section 7. NOTICES: There was no evidence of this section having been posted. The Captain, however, stated that the law, in this respect, had been complied with at the beginning of the voyage.

Respectfully,

(Sgd.) M. W. TSCHUDI,
Inspector.

(Sgd.) J. G. B. CAMERON,
Inspector.

Countersigned:

(Sgd.) L. R. MEDEIROS,
Deputy Collector.

(Sgd.) C. J. COOPER,
Examiner.

[Endorsed]: No. 81. (Title of Court and Cause.)
U. S. Exhibit #10. Filed Sep. 23, 1912. A. E.
Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy
Clerk. [234]

[U. S. Exhibit No. 11—Letter, April 18, 1911,
Governor to Collector.]

COPY—LD.

EXECUTIVE CHAMBER.

Honolulu, Hawaii, April 18, 1911.

E. R. Stackable, Esq.,
Collector of Customs,
Honolulu, T. H.

Sir: As requested orally this morning, I transmit herewith a copy of the letter of A. de Sousa Canavarro, Consul General for Portugal and Vice-Consul for Spain, to me this date regarding the treat-

ment of immigrants on the British SS. "Orteric," recently arrived at this port.

Very truly yours,

(Signed) W. F. FREAR,

Governor. [235]

COPY—LD.

10106.

Consulado Geral

de

Portugal em Hawaii.

Honolulu, Hawaii, April 18, 1911.

His Excellency Walter F. Frear,

Governor of Hawaii.

Honolulu, Hawaii.

Sir: I have the honor to bring to your attention the sad occurrence of 58 deaths among the children of Portuguese and Spanish immigrants arriving at the port of Honolulu on the 13th instant on board the British Steamship "Orteric."

Besides an individual investigation on the day of their arrival, at my request to the Board of Immigration, another investigation was made on board the said steamer in the presence of Dr. Victor Clark and Hon. A. Lindsay, Jr., the Attorney General of this Territory, and officers and physicians of the steamer. This investigation revealed the fact that measles broke out on the steamer on the Atlantic approximately 12 days after departure from Gibraltar, on the 24th of February last. During the 48 days of voyage, the lower decks of the steamer, where the passengers lived, were never washed, but simply swept three times a day and constantly cov-

ered with an abundance of disinfectants; the mattresses were never aired; and the absence of chambers, together with the fact that the water-closets were all located on the upper deck, must have affected the general hygienic condition of the immigrants.

The statement of Dr. Pugh, an English physician, as also the statement of Dr. Neves, a Portuguese assistant, and of Lieut. Costa, proved undoubtedly that the stubbornness of the immigrants was a serious obstacle to the efforts made to check the march of the epidemic, but, admitting that in other respects, the "Orteric" is one of the best equipped vessels that ever arrived in this port, [236] I cannot help but consider that the great mortality must, in part, have been caused by the above mentioned conditions.

Under the circumstances, I would respectfully ask your Excellency to call the attention of the United States District Attorney, or other proper official, as to whether criminal proceedings should not be begun against the Captain or officers of the vessel for their negligence, and also as to whether the Attorney General of this Territory should not take civil proceedings against the steamer in behalf of the sufferers of such negligence.

I would also respectfully bring to your attention the fact that I am informed that the "Orteric" will leave this port tomorrow. With the highest respect

and consideration, I have the honor to be, sir,

Your Excellency's most obedient servant,

A. DE SOUZA CANAVARRO,

Consul General for Portugal and Vice-Consul for
Spain.

[Endorsed]: No. 81. (Title of Court and Cause.)
U. S. Exhibit #11. Filed Sep. 23, 1912. A. E.
Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy
Clerk. [237]

[U. S. Exhibit No. 12 — Letter, April 26, 1911,
Collector to U. S. Attorney.]

No. 6167.

TREASURY DEPARTMENT.

United States Customs Service.

Port of Honolulu, Hawaii,

April 26, 1911.

Hon. R. W. Breckons,

U. S. District Attorney,

Honolulu, Hawaii.

Sir: I understand that the subject of the alleged violation of the Passenger Act of 1882, which formed the subject of my letters of the 18th instant, Nos. 6129 and 6131, was taken up by your Honorable Grand Jury which is in session at the present time. I am quite of the opinion that the report of the U. S. Grand Jury would be a very important document to lay before the Secretary of Commerce and Labor relative to the alleged violation of the Passenger Act of 1882 which no doubt will also touch upon the care and treatment of the emigrants on the voyage, and I am also quite certain in my own mind that

the Secretary of Commerce and Labor would be pleased to have an expression of opinion from the Grand Jury in order to make a comparison between the report of the customs officers' examination of the steamer and the finding of the Grand Jury.

If the report of the Grand Jury is made to you, I will consider it a personal favor if you will furnish me with an extract from this report touching upon the findings in the "Orteric" case. If, however, the report is not made to you, I would be pleased to have you take the matter up with the foreman of the Grand Jury and if consistent with law and regulations governing such bodies, I would be pleased to have a copy of the report to submit to the [238] Honorable Secretary of Commerce and Labor with my report.

Respectfully,
(Sgd.) E. R. STACKABLE,
Collector.

[Endorsed]: No. 81. (Title of Court and Cause.)
U. S. Exhibit #12. Filed Sep. 23, 1912. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [239]

[U. S. Exhibit No. 13—Report.]

During the session our attention was called to an alleged violation of the navigation laws of the United States, and particularly the Passenger Act of Congress of August 20, 1882, relative to steamships carrying immigrant passengers. We investigated particularly the case of the S. S. "ORTERIC," arriving in Honolulu on April 13, 1911. The

“ORTERIC” cleared from Oporto, Portugal, on February 21, 1911, arriving at Lisbon on February 22d, and at Gibraltar, Spain, on February 24, 1911, departing from the latter port finally for Honolulu. We have been unable to ascertain with exact accuracy the number of immigrants carried by her. When she arrived at Honolulu there were something over 1500 souls on board.

We have returned no indictments under the Act in question. When we completed our investigation it was reported to us by the Collector of Customs at Honolulu that a proper bond had been given by the owners of the vessel for the payment to the United States of America of all penalties which might have been incurred. There are but few provisions of the Act which provide for imprisonment as punishment for their violation, and as to these provisions, while perhaps some purely technical violation may have occurred, yet it was of such a nature that the Court upon conviction would in all probability have inflicted only a fine.

However, at the conclusion of the investigation we were requested by the Collector of Customs and the United States District Attorney to make a report relative to conditions on board of the vessel, in order that the proper department at Washington, in inflicting the fines and penalties, if any are to be inflicted, should have the benefit of the result of our investigation. It also appeared to us that a report thereon might be of some assistance [240] to both the territorial and federal officials in the future, where immigrants are being brought to the territory.

We ourselves visited the “ORTERIC,” and had

before us some of the federal officials connected with the quarantine service and the customs service, some of the persons connected with the boat, and one of the officials of the Territorial Board of Immigration. We were thus able to get a fairly intelligent understanding of conditions as they existed on board, particularly with reference to compliance with the requirements of the Passenger Act.

In the construction and arrangement of the vessel, single male passengers, while berthed by themselves according to law, were obliged to pass through the compartments assigned to married people in order to reach the upper deck of the vessel. Whether this was a violation of the provisions of the law relative to the sexes being kept separate and apart, we are not prepared to say. However, the evidence disclosed that beyond question, during the latter part of the voyage no attempt was made to have the law relative to separation of sexes complied with, and single men occupied berths in compartments set apart for married men and women, and married people occupied compartments set apart for single men. There appears to have been some trouble on board of the vessel which, it seemed to the officers of the vessel, rendered it advisable to keep Portuguese immigrants and Spanish immigrants in different parts of the vessel. Subsequent to this trouble, all regulations relative to separation of the sexes were disregarded.

The law relative to ventilation was not complied with, according to the evidence submitted to us, nor could we find [241] evidence whatever that the

ventilating apparatus really provided had been approved by the proper immigration officials of the port or place from which the vessel was cleared, an approval which is necessary under the terms of Section 3 of the Act, where the method of ventilation really provided does not comply with the law of the United States. Some inspection was had when the vessel sailed from Portuguese ports, but none before she sailed from Gibraltar. A system of ventilation might well be sufficient for six or seven hundred immigrants, and not sufficient and proper for fifteen hundred. The port-holes in the various compartments did not admit air for proper ventilation. Notwithstanding the fact that there was an electric light plant on board, there were no electric fans provided. The use of these fans, at a very small cost, might have ameliorated conditions.

We found from the evidence that lack of ventilation to some extent contributed to the large mortality on the vessel during her voyage. When severe weather necessitated closing some of the port-holes and hatches, the rate of mortality increased, the ventilating apparatus itself not supplying sufficient air.

The food on board appears to have been ample and of good quality. Perhaps the method of its preparation did not quite accord with the previous habits of the immigrants, but as to this no complaint can be made. Tables and seats were provided in the compartments. They were not, however, sufficient to seat all of the passengers in three sittings.

There was some uncertainty in the testimony as

to the condensed milk furnished for the use of infants. We investigated [242] this as carefully as we could, owing to the fact that the mortality on board was almost entirely confined to infants. From the condition of the evidence, however, we would not be inclined to attach any blame to the owners of the vessel on this account.

The hospitals on board of the vessel were not as required by law, and in our opinion from the evidence, wholly unfit for the purposes for which hospitals are provided. The ventilation in them was poor, and the space allotted to them entirely too small. The compartments used as lying-in hospitals were wholly inadequate in every respect, and in some instances, as to these latter hospitals, we found that even ordinary conveniences were not provided for the inmates. In this respect we believe that the apparent ignorance and lack of cleanliness constitute no excuse for failure to provide accommodations. With the class of passengers such as were brought on the "ORTERIC" excess of care relative to hospitals is more desirable than a failure to comply strictly with the law.

The provisions of the Passenger Act relative to *cleanliness* were violated in a manner which cannot be too strongly condemned. On the lower deck, on which passengers were berthed, neither closets nor conveniences were provided for the passengers, and this is also true of the deck above the lower deck. All of the water-closets on board of the vessel were on the upper deck, and could be used only by passengers able or willing to climb there. No proper

method appears to have been adopted to protect the vessel against the filthy condition which was necessarily created. The decks were not washed, and the filth apparently was permitted to remain, being sprinkled over with sawdust and some kind of disinfectant. [243] The result was an almost intolerable stench, which existed even up to the day when the vessel was examined by us.

No conveniences whatever were originally provided for the use of children, and such as were provided were improvised after the vessel had commenced her voyage, and were in our judgment wholly unfit from all standpoints.

No arrangements seem to have been made by which the immigrants might keep themselves in a cleanly condition, had they so desired. No bath rooms were provided, and up to within a few weeks of the completion of the voyage, the only way in which a bath of any kind could be indulged in was in the public wash room. A short time before the vessel arrived in Honolulu, a water pipe was fixed up in such a way that something resembling a shower bath might be taken, but there was little privacy even as to this.

No attempt appears to have been made to muster the passengers on the upper deck when the weather permitted, as is provided by law. Nor was any attempt whatever made to air or clean the bedding of the immigrants. The mattresses and bedding used by them were never during the entire voyage save in a few rare instances where the passengers themselves acted, taken from the berths where they

were first placed. When the vessel arrived at Honolulu, it became necessary to burn all of the mattresses.

While it is true that the immigrants on the vessel were of a class who are not over-cleanly in their own homes, yet some of them evinced a desire to in some degree better the conditions existing on the boat. Some of the passengers improvised conveniences of their own. In any event, however, no opportunities were afforded them for keeping clean, and it is to be wondered at that no more deaths occurred than actually did take place. [244]

On the whole, we are of the opinion that the Passenger Act was in a number of respects violated, and with the evidence before us, would probably have returned indictments had it not been for the action of the owners of the vessel in frankly submitting the facts to the Department of Commerce and Labor for its determination, and agreeing to abide by whatever decision that department might make. We cannot emphasize too strongly the necessity for the observance of regulations requiring vessels to be kept in a clean and sanitary condition. When poor immigrants, perhaps unaccustomed to modern methods of sanitation, are brought into a tropical climate such as Hawaii, not only their own good, but the good of the community in general is subserved by a rigid insistence on compliance with the law.

[Endorsed]: No. 81. (Title of Court and Cause.) U. S. Exhibit #13. Filed Sept. 23, 1912. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [245]

[U. S. Exhibit No. 14—Letter, April 21, 1911,
Findlay to Collector, etc.]

Copied-2-HES. May 31/11.

Honolulu, T. H., April 21st, 1911.

E. R. Stackable, Esq.,

Collector of Customs.

Sir: I beg to state that I have finished discharge, and the Harbor Master has requested me to remove my steamer from the Railroad wharf where she is now lying.

Will you kindly grant me permission to take my steamer outside the Harbor, to be anchored there until I obtain my clearance papers.

I am, Sir,

Yours respectfully,

(Sgd.) JAMES FINDLAY,

Master, British Steamer "Orteric."

THEO. H. DAVIES & CO., LTD.,

(Sgd.) W. H. BAIRD,

Treasurer,

Agents. [246]

6146.

GPT.

Honolulu, Hawaii, April 21, 1911.

Captain J. F. Findlay,

Master, Br. S. S. Orteric,

Honolulu, Hawaii.

Sir: Receipt is acknowledged of your letter of even date making application to take the Br. S. S. "Orteric" outside to anchor until your clearance papers are obtained. This permission is granted, with the understanding that the vessel is anchored

in what is known as the usual anchorage grounds until your clearance papers are obtained from this office.

Respectfully,

Collector.

[Endorsed]: No. 81. (Title of Court and Cause.)
U. S. Exhibit #14. Filed Sep. 23, 1912. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [247]

[U. S. Exhibit No. 15 —Letter, May 15, 1911, U. S. Attorney to Collector.]

10106.

DEPARTMENT OF JUSTICE.

Office of

UNITED STATES ATTORNEY,

District of Hawaii.

Honolulu, May 15, 1911.

Honorable E. R. STACKABLE,

Collector of Customs,

Honolulu, Hawaii.

SIR: Replying to your letter of April 26, 1911 (#6167) relative to the "ORTERIC" matter, I beg leave to hand you herewith a copy of the report of the grand jury relative thereto. I have not thought it necessary to have the same certified to. I personally know that the copy enclosed you herewith is correct.

Should you, after ascertaining what claims are made by the owners of the vessel, wish any statement from me relative thereto, I shall be pleased to

make the same. I am, I think, very well acquainted with all of the facts in the case, and hold myself at your disposal.

Respectfully,

(Sgd.) ROBT. W. BRECKONS,

United States District Attorney.

[Endorsed]: No. 81. (Title of Court and Cause.)
U. S. Exhibit #15. Filed Sep. 23, 1912. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [248]

[U. S. Exhibit No. 16—Letter, June 8, 1911, Holmes, Stanley & Olson to Collector.]

HOLMES, STANLEY & OLSON.

Attorneys-at-Law.

Honolulu, T. H., June 8, 1911.

Hon. E. R. Stackable,

Collector of Customs at Honolulu,

Honolulu, T. H.

Sir:—

In re S. S. "Orteric."

Referring to the matter of the alleged violations of the Passenger Act of 1882 as amended, charged against Captain Findlay, Master of the S. S. "Orteric," in her recent voyage to Hawaii, transporting Spanish and Portuguese immigrants to Hawaii, as set forth in your letter to Captain Findlay under date of April 17, 1911, we beg to state that we regret exceedingly the fact that we have been unable to submit the facts and case on behalf of Captain Findlay before this time. We were delayed until the latter part of May in obtaining the affidavit of Miss

Edith Hyde at present residing at Hilo, Hawaii, who was one of the nurses on the "Orteric" and therefore in a position to give material testimony concerning the charges.

We should have presented our case immediately upon receipt of Miss Hyde's affidavit, in accordance with our assurance to you to that effect, but for the fact that we were advised that Mr. A. J. Campbell, the representative of the Territorial Board of Immigration, who was present at the embarkation of the immigrations and the departure of the "Orteric" from Europe, is expected to arrive in Honolulu returning from Europe on Monday, the 12th day of June, 1911.

One of the charges made against Captain Findlay is that the ventilating devices of the "Orteric" did not conform to the [249] requirements of Section 3 of the Passenger Act. We are credibly informed, however, that proper emigration officers inspected the vessel at her port of clearance and approved of the same after sundry alterations, including the ventilating devices.

Section 3 of the Passenger Act contains a proviso that in case the ventilating apparatus is approved by the emigration officers at the port of clearance, such approval shall suffice to show a compliance with the requirements of the Act in this respect.

We believe that we shall be able to establish that such inspection and approval were had by the testimony of Mr. Campbell.

We therefore request the indulgence of your department for such further time as will enable us to

secure Mr. Campbell's testimony, when we will immediately submit to you our case, which will not be later than Tuesday, the 13th day of June, 1911.

While appreciating your desire to have the matter closed as soon as possible, as you have frequently advised us, and also that we have caused the delay thus far on account of the circumstances related, we trust that you will be able to extend the further time requested.

Respectfully,

(Sgd.) HOLMES, STANLEY & OLSON,
Counsel for Captain Findlay, Master of S. S.
"Orteric."

CHO/L.

[Endorsed]: No. 81. (Title of Court and Cause.)
U. S. Exhibit #16. Filed Sept. 23, 1912. A. E.
Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy
Clerk. [250]

[U. S. Exhibit No. 17—Letter, June 13, 1911, Holmes,
Stanley & Olson to Collector.]

HOLMES, STANLEY & OLSON,

Attorneys-at-Law.

Honolulu, T. H., June 13, 1911.

Hon. E. R. Stackable,

U. S. Collector of Customs at Honolulu,
Honolulu, T. H.

Sir:

In re S. S. "Orteric."

By written communication dated June 8, 1911, addressed by us to you, we requested that we be allowed to await the return of A. J. Campbell, Esq.,

the Territorial Board of Immigration representative who was present at the *department* of the "Orteric" from its port of clearance in Europe, in order that we might secure his testimony, to show, as we believed to be possible, that the "Orteric," including its ventilating apparatus, had been approved by the emigration authorities of Portugal at said port of clearance in accordance with the proviso contained in Section 3 of the Passenger Act of 1882 as amended. We stated that we were informed that Mr. Campbell was expected to return on the 12th inst., which would enable us to submit the case on behalf of Captain Findlay not later than to-day.

However, Mr. Campbell did not return yesterday, the 12th of June, 1911, and we are now informed that he will arrive in Honolulu on Friday, June 16, 1911.

Notwithstanding the non-arrival yesterday of Mr. Campbell we now submit for presentation to the Department of Commerce and Labor of the United States, the following:

1. Affidavit of Captain James Findlay, Master of the S. S. "Orteric";
2. Attached to said Affidavit of Captain Findlay, the confirmatory affidavits of Arthur Atkins, Chief Officer of [251] the S. S. "Orteric," and John Hopkins Pugh, ship's doctor of the S. S. "Orteric";
3. Affidavit of said John Hopkins Pugh, ship's doctor of the S. S. "Orteric";
4. Affidavit of Edith Hyde, one of the nurses on the S. S. "Orteric";
5. Copies of notices required by Section 7 of the

Passenger Act of 1882 as amended, in the English, Portuguese and Spanish languages, which were posted according to the above-mentioned affidavits, as required by said Section 7. These copies were obtained by undersigned counsel on board the S. S. "Orteric" from the Captain and Chief Officer thereof.

It will be observed from the affidavit of Captain Findlay that reference is made to a copy of the plans of the S. S. "Orteric" in the possession of Andrew, Weir & Company of London, the owners of the vessel, and specifications attached thereto. We beg to state that we shall endeavor to have these plans and specifications submitted to the Department of Commerce and Labor by Messrs. Andrew Weir & Company, in order that the Department may be the better advised concerning the vessel.

Referring to the testimony that we had expected Mr. Campbell to give, we request that we be permitted to submit a supplemental presentation of facts concerning the alleged violation of Section 3, to wit, insufficient ventilating apparatus, by means of affidavit or affidavits to be secured immediately upon the return of Mr. Campbell.

In order that we may deal with the entire case, we also request to be permitted to submit at the same time a written argument as to the applicability of the evidence presented. [252]

Respectfully,

(Sgd.) HOLMES, STANLEY & OLSON,
Attorneys for Captain James Findlay, Master of
S. S. "Orteric."

CHO/L.

[Endorsed]: No. 81. (Title of Court and Cause.)
U. S. Exhibit #17. Filed Sep. 23, 1912. A. E.
Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy
Clerk. [253]

[U. S. Exhibit No. 18—Affidavits.]

**Affidavit of Captain James Findlay, Master of
British Steamship "Orteric."**

United States of America,
Territory of Hawaii,
City and County of Honolulu,—ss.

James Findlay, being first duly sworn, deposes and
says:

That he is the Master of the British Ship
"Orteric"; that the said steamship was launched in
December 1910 and that affiant has been her Master
ever since her launching; that on the 24th day of
February, 1911, the said steamship left Gibraltar
with about 1500 Spanish and Portuguese emigrant
passengers aboard whose destination was Honolulu
in the Territory of Hawaii; that the said steamship
had been chartered for the purpose of conveying said
emigrants to said Honolulu by one A. J. Campbell,
acting according to the information and belief of
affiant, on behalf of the Board of Immigration of the
Territory of Hawaii; that about 550 of said pas-
sengers were Portuguese and the remainder Spanish;

That on Sunday, the 5th day of March, 1911, a riot
occurred among the passengers of said steamship, on
the upper deck thereof, the Portuguese male pas-
sengers, on the one side, and the Spanish male pas-
sengers on the other, engaging in a pitched battle;

that the said passengers engaging in said battle were armed variously with knives, clubs, cleavers and pistols; but that before any serious injuries were sustained affiant and his officers by interfering were able to prevent further engagement;

That theretofore, all male passengers upwards of 14 years of age who did not occupy berths with their wives were berthed in the fore part of the said steamship in a compartment divided off from the spaces appropriated to the other passengers by substantial and well secured bulkheads; but after the said riot, the Portuguese male passengers absolutely refused to [254] remain berthed in the same compartment with the Spanish male passengers theretofore occupied as aforesaid by single male passengers, stating that they were in fear of injury and of having their lives taken by said Spanish single male passengers; that in order to maintain discipline and prevent bloodshed, affiant deemed it mandatory to segregate the Portuguese passengers from the Spanish passengers, and therefore affiant removed said Portuguese male single passengers from said compartment in the fore part of said vessel aft; that had the said races not been segregated as aforesaid, affiant believes that serious trouble would have resulted with probable loss of life;

VENTILATION: That on the 21st day of February, 1911, the said steamship was cleared from the port of Oporto in Portugal, preparatory to her departure on said voyage to Hawaii; that on the day preceding, about 10 Portuguese officials, among whom affiant believes were included Portuguese

emigrant officials, carefully inspected the said steamship, being engaged for about two hours in such inspection; that the said steamship was inspected with reference to construction, equipment, food supply, and ventilation, and was approved in all such respects and otherwise by all of said officials;

That affiant believes that the ventilating devices in each compartment occupied by passengers on said trip were equal in capacity and utility to the ventilating specifications set forth in section 3 of the "Passenger Act of 1882" as amended, to wit, two ventilators, each not less than 12 inches in diameter, one in the foreward part of each such [255] compartment and one in the after part thereof, and additional ventilators for each compartment in the proportion of two for each additional 50 passengers in each such compartment, and all ventilators carried at least 6 feet above the uppermost deck of the vessel; as will be more particularly shown by a copy of the plans now in the possession of Andrew Weir & Co. of London, England, the owners of said steamship, and the specifications attached thereto, to be supplied for use in connection with this affidavit;

CLOSETS: That there were sufficient closets in number in proportion to the number of passengers according to the requirements of said Section 3 of said Passenger Act, all enclosed, some of which were located on one side of the upper deck of said steamship and the others on the other side of said upper deck;

FOOD: That while milk for infants and children was served regularly only twice a day, nevertheless

mothers of such infants and children were at all times supplied upon application with condensed milk at other times, and often served at irregular times without application;

HOSPITALS: That the said steamship contained two hospital compartments regularly fitted as hospitals on the upper deck of said steamship, ventilated by large skylights and large portholes, and thoroughly lighted; that on account of the number of passengers, two large compartments aggregating more than 1500 square feet in area, were utilized as hospitals, that said additional, temporary hospitals were located about amidships on the shelter deck; that each of said compartments [256] was fitted with three coaling ports, communicating with the upper deck; that whenever the weather permitted, said coaling ports were kept open in order to ventilate said temporary hospitals; that said coaling ports were each not less than 20 inches square; that said compartments also had a door each opening into the fidley which was at all times open through the upper deck; that said doors were about 6 feet high and 2 feet wide and were kept open at all times, thus affording great quantities of fresh air for said temporary hospitals; that said compartments were also fitted with other ventilators, and were amply provided with ventilating devices;

DISCIPLINE AND CLEANLINESS: That affiant together with the Chief Officer, Arthur Atkins, the ship's doctor, John Hopkins Pugh, and Joachin Costa, a Spanish and Portuguese interpreter, almost, every day, and one or more of said persons, every

day, inspected the said steamship and the said passengers, and warned and directed the said passengers through said interpreter, to keep themselves in a cleanly condition and to stay on the upper deck as much as possible; that they directed said passengers to air their baggage and bedding whenever the weather would permit, but with few exceptions the said passengers refused so to do, stating that they feared their belongings would be stolen; that on account of the great number of passengers, it was impossible for the ship's crew to air said bedding and baggage without the assistance of said passengers; that at all times the said crew was engaged in cleaning the decks and compartments and did all in that respect that could reasonably be done; [257]

That the said steamship arrived off the port of Honolulu early on the morning of the 13th of April, 1911, and breakfast was served on board to said passengers before entering the harbor of Honolulu; that the said passengers were greatly excited in view of the approaching landing and end of the voyage, and after eating as much as they wished threw the remnants of the breakfast served about the floors and decks instead of throwing the same overboard as they had customarily done theretofore, and refused to do any cleaning; that the ship's crew were obliged to prepare the vessel for entry into the harbor, and were unable to cleanse the said vessel, on account of which the said remnants of the said breakfast remained on the floors and decks of said steamship when the customs officials boarded the said steamship; that also the said passengers tore cloth from

many of the mattresses in order to make bags thereof for the purpose of carrying off their belongings, in consequence of which the contents of the said mattresses were strewn together with discarded rubbish theretofore belonging to said passengers, about the said vessel; that the acts aforesaid were done immediately prior to the boarding of the said vessel by the United States Officials, and by direction of the collector of the port, the vessel was left in the same condition in which it was at that time for some days after the docking in said port of the said vessel;

POSTING OF COPIES OF SECTION 6 OF SAID PASSENGER ACT: That at the beginning of said voyage copies of said Section 6 were posted, both in the Portuguese and Spanish [258] languages, in all of the companionways and various parts of the vessel, but in the course of the voyage many of them were torn down by the passengers; that such notices were again posted about the vessel about two weeks before her arrival in said Honolulu; that very few of said passengers were able to read;

PASSENGER MANIFESTS: That after said riot on board said steamer, the shifting of the passengers in order to segregate the Spanish from the Portuguese, resulted in some confusion, making it impossible for affiant to include in the list of passengers the exact compartments and spaces occupied by them thereafter;

That the said steamship will hereafter be regularly engaged in plying between ports of British Columbia, Puget Sound and the Orient, and affiant expects to continue to act as her Master.

JAMES FINDLAY.

Subscribed and sworn to before me this 22d day of April, 1911.

[Seal]

GEO. S. CURRY,
Notary Public, First Judicial Circuit, Territory of
Hawaii. [259]

**Affidavit of Arthur Atkins, Chief Officer of British
Steamship "Orteric."**

United States of America,
Territory of Hawaii,
City and County of Honolulu,—ss.

Arthur Atkins, being first duly sworn, deposes and says: That he is, and at all times since the launching of the British Steamship "Orteric" in December, 1910, has been, the Chief Officer of said "Orteric"; that he has read the foregoing affidavit of Captain James Findlay hereto attached, contained in six typewritten pages, and sworn to before George S. Curry, a Notary Public of the First Judicial Circuit of the Territory of Hawaii, on the 22d day of April, 1911, and knows the contents thereof; and that the matters and things therein set forth and the allegations therein made are true; and that he confirms the said affidavit in all respects.

ARTHUR ATKINS.

Subscribed and sworn to before me this 22d day of April, 1911.

[Seal]

CHARLES F. PETERSON,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

**Affidavit of John Hopkins Pugh, Ship's Doctor of
British Steamship "Orteric."**

United States of America,
Territory of Hawaii,
City and County of Honolulu,—ss.

John Hopkins Pugh, being first duly sworn, deposes and says: That he is, and at all times since the 15th day of February, 1911, has been, the ship's doctor of the British Steamship "Orteric"; that he has read the foregoing affidavit of Captain James Findlay [260] hereto attached, contained in six typewritten pages and sworn to before George S. Curry, a Notary Public of the First Judicial Circuit of the Territory of Hawaii, on the 22d day of April, 1911, and knows the contents thereof; and that the matters and things therein set forth and the allegations therein made are true; and that he confirms the said affidavit in all respects.

JOHN HOPKINS PUGH.

Subscribed and sworn to before me this 22d day of April, 1911.

[Seal] CHARLES F. PETERSON,
Notary Public, First Judicial Circuit, Territory of
Hawaii. [261]

**Affidavit of John Hopkins Pugh, Ship's Doctor of
the British Steamship "Orteric."**

United States of America,
Territory of Hawaii,
City and County of Honolulu,—ss.

John Hopkins Pugh, being first duly sworn, deposes and says:

That he is, and since the 15th day of February, 1911, has been at all times, the ship's Doctor of the British Steamship "Orteric";

That he studied in the University of Cambridge, England, and received from said University the degree of Bachelor of Arts in 1871; that during the next three years, affiant continuously studied medicine at St. Thomas' Hospital in London, England, and in 1874 became a Licentiate of the Society of Apothecaries of London and was registered as a medical practitioner of the United Kingdom of Great Britain and Ireland; that in 1877 affiant received a diploma in surgery and medicine from the Royal College of Surgeons of England; that from 1874 until 1903 affiant was continuously engaged in the practice of medicine and surgery; that for 15 months in 1904 and 1905 affiant was continuously employed by the Transvaal Government as Surgeon Superintendent of Chinese Immigrants from China to Transvaal, and as such had direct superintendence of all immigrants from China to Transvaal; that since that time affiant has been ship's doctor on immigrant ships to Australia from England, and in 1907 on the British Steamship "Kumeric" which conveyed

about 1150 immigrant passengers from the Island of Madeira to Hawaii;

That affiant directly superintended all of the sanitation and sanitary measures on board the said "Orteric" on the trip from Portugal to Hawaii which ended at Honolulu on the 13th day [262] of April, 1911; and directly attended or superintended the medical attention given all patients aboard said "Orteric" on said trip;

That under the direction of affiant, all compartments and decks were swept not less than twice daily, and were also daily disinfected with powder containing 20% carbolic acid and with *cyllin*, a dry powder, suitable for disinfection, and far more powerful as a disinfectant than chloride of lime; that affiant would not permit the washing of compartments occupied by passengers because in the opinion of affiant and according to the experience of medical men having charge of immigrant vessels carrying similar passengers in large numbers on prolonged voyages, washing of such compartments necessarily results in unavoidable dampness which has been proved to be highly detrimental to the health of the passengers;

That any and all accumulations on the said vessel were rendered physiologically harmless and innocuous by disinfectants; that the sleeping compartments were scraped with shovels every day and swept;

That most of the litter found on board the said "Orteric" upon her arrival at Honolulu, was the result of food and rubbish and the contents of mattresses being thrown or strewn about the deck by the passengers in their excitement and haste to land;

That the temporary or additional hospital quarters used on said trip, were in the opinion of affiant, well suited to that purpose considering the circumstances;

That the mortality on board said vessel during said trip was very largely due to the concealment by parents of ailments of their children and their refusal to submit them to medical treatment;

That while milk was served regularly only twice a day [263] nevertheless condensed milk was served at irregular times throughout each day to the mothers of the children for the use of such children, both upon application and without application, constant inspection was made by affiant, and milk supplied in all cases where it was found necessary; that 48 one-pound tins of condensed milk, on an average, were dispensed amongst the passengers for the use of the children and nursing mothers, each day; that said quantity of condensed milk would provide not less than 24 gallons of liquid milk, a quantity ample for the requirements of the children and nursing mothers;

That the water supply on board said "Orteric" for bathing and washing of said passengers was unlimited, and the usual accommodations for washing existed on said steamer.

JOHN HOPKINS PUGH.

Subscribed and sworn to before me this 22d day of April, 1911.

[Seal]

CHARLES F. PETERSON,

Notary Public, First Judicial Circuit, Territory of Hawaii. [264]

Affidavit of Edith Hyde.

United states of America,
Territory of Hawaii,
County of *Hawaii*,—ss.

Edith Hyde, being first duly sworn, deposes and says:

That she resides at present at Hilo, Island and Territory of Hawaii;

That she was one of the nurses employed on the British Steamship “Orteric” on a recent trip from Portugal to Hawaii transporting Spanish and Portuguese emigrants to Hawaii, the said Steamship having completed her voyage by her arrival at Honolulu, Territory of Hawaii, on the 13th day of April, 1911;

That she assisted throughout said voyage in caring for the passengers who were ill and for infants; that milk was served twice daily regularly throughout said voyage and at irregular times in addition whenever desired by the mothers of infant children and also whenever it appeared necessary to the hospital staff; that affiant believes that milk in ample quantities was served at all times throughout said voyage;

That the said steamship was equipped with two hospital compartments regularly fitted as hospitals on the upper deck of said steamship; that said hospitals were ventilated by large skylights and port-holes and the lighting thereof was excellent; that temporary hospitals were fitted about amidships on the shelter deck to accommodate passengers who

might become ill in view of the large number of passengers; that said temporary hospitals were well ventilated and at all times were supplied with fresh air;

That about a week out from Gibraltar, a riot occurred [265] on board said steamship, caused by differences between the Portuguese on the one side and the Spanish passengers on the other; that thereafter the Portuguese passengers absolutely refused to remain in the same quarters with the Spanish passengers on account of fear of violence, and therefore the two nationalities were segregated from each other.

EDITH HYDE.

Subscribed and sworn to before me this 18th day of May, 1911.

[Seal]

CARL S. SMITH,

Notary Public, Fourth Circuit, Territory of Hawaii.

[266]

United States' Navigation Laws.

Immigrant Ships.

Section 148. Privacy of Passengers. Neither the officers, seamen, nor other persons employed on any such steamship or other vessel shall visit or frequent any part of the vessel provided or assigned to the use of such passengers, except by the direction or permission of the Master of such vessel first made or given for such purpose; and every officer, seaman, or other person, employed on board of such vessel who shall violate the provisions of this section, shall be deemed guilty of misdemeanor, and may be fined not exceeding 100 dollars, and be imprisoned not exceeding 20 days, for each violation; and the Master

of such vessel who directs or permits any officer, seaman, or other person employed on board the vessel to visit or frequent any part of the vessel provided for or assigned to the use of such passengers, or the compartments or spaces occupied by such passengers, except for the purpose of doing or performing some necessary act or duty as an officer, seaman, or other person employed on board of the vessel, shall be deemed guilty of a misdemeanor, and may be fined not more than 100 dollars for each time he directs or permits the provisions of this section to be violated. A copy of this section, written or printed in the language or principal languages of the passengers on board, shall, by or under the direction of the Master of the vessel, be posted in a conspicuous place on the forecastle, and in the several parts of the vessel provided and assigned for the use of such passengers, and in each compartment or space occupied by such passengers, and the same shall be kept so posted during the voyage; and if the said Master neglects so to do, he shall be deemed guilty of a misdemeanor, and shall be fined not more than 100 dollars. [267]

[Endorsed]: No. 81. (Title of Court and Cause.)
U. S. Exhibit #18. Filed Sep. 23, 1912. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [268]

[U. S. Exhibit No. 19—Letter, April 24, 1911,
Collector to Secretary of Commerce and Labor.]

No. 9911.

LED.

Honolulu, Hawaii, April 24, 1911.

The Honorable,

The Secretary of Commerce and Labor,

Bureau of Navigation,

Washington, D. C.

Sir:—

I have the honor to confirm my cablegram of the 22nd instant which reads as follows: "Secretary Commerce, Labor, Washington—Agents British *steam* Orteric make application clear under bond covering alleged penalties amounting approximately ten thousand dollars passenger act 1882. Recommend favorable consideration. Customs."

This cablegram was sent at the request and expense of Messrs. Theo. H. Davies & Co., Ltd., agents of the above named vessel.

Respectfully,

(Sgd.) E. R. STACKABLE,

Collector.

Copy /HES.

[Endorsed]: No. 81. (Title of Court and Cause.)
U. S. Exhibit #19. Filed Sep. 23, 1912. A. E.
Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy
Clerk. [269]

[U. S. Exhibit No. 20 — Letter, April 22, 1911,
Hogan to Secretary of Commerce and Labor.]

BAKER, SHEEHY & HOGAN,
Attorneys & Counsellors at Law.
Evans Building,
Washington, D. C.

April 22, 1911.

The Secretary of Commerce and Labor,
Washington, D. C.

Sir:—Under date of the 21st instant, Andrew Weir and Company, 6 Lloyds Avenue, London, England, owners of the “eric” steamers, addressed to me their Washington representative, a cablegram of which the following is a translation:

“The American Immigration Board at Honolulu is holding up the new steamer ORTERIC on account of an alleged breach of passengers act; the steamer and all store approved Campbell Board’s representatives; single passengers from Portugal, Spain, rioted and the captain had to keep separate to save the situation. Now the Honolulu officials are giving trouble; a cargo is waiting at Seattle for this steamer, and unless it is promptly released at Honolulu, a very serious situation will result; please present the matter to the Immigration authorities at Washington and request their usual prompt attention.”

The reference from the foregoing to the Immigration Board at Honolulu is accounted for by the failure of my English principals to understand that the

matter in question comes under the jurisdiction of the Collector of Customs.

The detention of the ORTERIC at Honolulu for any considerable time will doubtless result in great loss. We have cabled for details, but readily understand that unless you are officially informed it would be necessary, after we are in a position to present details to you that you seek an official report before you would be in a position to act in this matter.
[270]

In view of this, and of the patent importance of minimizing delay, I respectfully request that the Department instruct the Collector of Customs at Honolulu by cable, to report by cable the cause of the ORTERIC'S detention with such details as may be necessary to enable the Department to act on the owners' request, which request is this:

That the ORTERIC be permitted to proceed on her voyage upon her master or Honolulu agent entering into bond for making good of any penalty found to be due either by the vessel or the master; and that upon the coming in of a formal report of the matter the questions involved be then adjudicated after a hearing.

Yours very respectfully,

(Sgd.) FRANK J. HOGAN.

[Endorsed]: No. 81. (Title of Court and Cause.)
U. S. Exhibit #20. Filed Jan. 20, 1913. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [271]

[U. S. Exhibit No. 21—Letter, June 17, 1911, Hogan to Commissioner of Navigation.]

BAKER, SHEEHY & HOGAN,
Attorneys & Counsellors at Law.
Evans Building,
Washington, D. C.

June 17, 1911.

Commissioner of Navigation,
Department of Commerce and Labor,
Washington, D. C.

Sir: In re charges of violations of passenger act by steamer ORTERIC, at Honolulu:

Confirming my visit to your office this morning and your direction that a report be called for on the above subject, this letter is written that it may be put on your file of the case as a reminder of my request to be informed whenever report relative to the alleged violation by the steamship ORTERIC of certain sections of the passenger act, charges respecting which were made at Honolulu by the Collector of Customs on April 17, 1911, is received at your office.

Yours, very respectfully,

(Sgd.) FRANK J. HOGAN,
Attorney for Frank Waterhouse & Co., Inc.

[Endorsed]: No. 81. (Title of Court and Cause.)
U. S. Exhibit #21. Filed Jan. 20, 1913. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [272]

[U. S. Exhibit No. 22—Letter, Undated, Baker,
Sheehy & Hogan to Cable.]

COPY.

BAKER, SHEEHY & HOGAN,
Attorneys & Counsellors at Law.

Evans Building,
Washington, D. C.

Hon. Benjamin S. Cable,
Acting Secretary, Department of Commerce and
Labor,
Washington, D. C.

Sir: Referring to your letter of the 30th ultimo, addressed to our Mr. Hogan, advising that the Department has now received report of the Collector of Customs at Honolulu, in regard to penalties aggregating \$7,960., incurred by the British steamer ORTERIC for violation of sections 2, 3, 5, 6, and 9 of the Passenger Act of 1882, we have the honor to inform you that Mr. Hogan is absent from Washington, and your communication was forwarded to him in view of the fact that the matter referred to is in his personal charge.

Mr. Hogan requests us to advise you that his return here is expected in the week of the 24th instant. If the matter of the ORTERIC can be permitted to await his return, we would be greatly obliged. If, however, it must be disposed of prior to that time, we will forward the papers to Mr. Hogan in order that he may send to you, in writing, the points which he desires the Department to consider. We are sure

that he would prefer to supplement any written brief of his contentions by a verbal presentation, and we trust that the Department may be able to permit the matter to await his return.

Yours, very respectfully,

BAKER, SHEEHY & HOGAN.

By J. C. SHEEHY.

[Endorsed]: No. 81. (Title of Court and Cause.)
U. S. Exhibit #22. Filed Jan. 20, 1913. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [273]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

United States of America,
District of Hawaii,—ss.

I, A. E. Murphy, Clerk of the District Court of the United States for the District of Hawaii, do hereby certify that the foregoing pages, numbered from 1 to 274, inclusive, are a true and complete transcript of the record and proceedings had in said Court in the cause of The United States of America vs. James F. Findlay, T. Clive Davies and W. H. Baird, as the same remains of record and on file in my office, and I do further certify that I hereto annex the original Writ of Error and Citation on Appeal in said cause.

I further certify that the cost of the foregoing transcript of record is \$64.00, and that said amount has been paid to me by the appellants.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 27th day of October, A. D. 1914.

[Seal] A. E. MURPHY,
Clerk, United States District Court, Territory of
Hawaii. [274]

[Endorsed]: No. 2511. United States Circuit Court of Appeals for the Ninth Circuit. James F. Findlay, T. Clive Davies and W. H. Baird, Plaintiffs in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Territory of Hawaii.

Received and filed November 4, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.